

No. 11766

United States
Circuit Court of Appeals
For the Ninth Circuit

see vol. 2502

BURNHAM CHEMICAL COMPANY, a corporation,

Appellant,

VS.

BORAX CONSOLIDATED, LTD., a corporation,
PACIFIC COAST BORAX COMPANY, a
corporation, UNITED STATES BORAX
COMPANY, a corporation, and AMERICAN
POTASH & CHEMICAL CORPORATION,
Appellees.

Transcript of Record
IN TWO VOLUMES
VOLUME I
Pages 1 to 450

Upon Appeal from the District Court of the United States
for the Northern District of California,
Southern Division

JAN 28 1948

PAUL P. O'BRIEN, CLERK

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In the District Court of the United States for the
Northern District of California, Southern
Division

No. 24948-G

BURNHAM CHEMICAL COMPANY,
a corporation,

Plaintiff.

vs.

BORAX CONSOLIDATED, LTD.; PACIFIC
COAST BORAX COMPANY; UNITED
STATES BORAX COMPANY; STERLING
BORAX COMPANY; SAN BERNARDINO
BORAX MINING COMPANY; AMERICAN
POTASH & CHEMICAL CORPORATION;
ONE TWO COMPANY; THREE FOUR
COMPANY; FIVE SIX COMPANY;
SEVEN EIGHT COMPANY; JOHN DOE;
RICHARD ROE; TOM NINE; and JOHN
TEN,

Defendants.

COMPLAINT

To the Honorable, the Judges of the District Court
of the United States for the Northern District
of California, Southern Division:

Plaintiff above named complains against defend-
ants above named and for cause of action alleges:

Jurisdiction and Venue

1. This complaint is filed and these proceedings
are instituted under an act of Congress of July 2,
1890, as amended, [1*] entitled "An Act to Protect

* Page numbering appearing at foot of page of original certified
Transcript of Record.

Trade and Areas against Unlawful Restraints and Monopolies (15 U.S.C. Sec. 15)”, said act being commonly known and hereinafter referred to as the Sherman Act, against the above named defendants in order to recover damages suffered by plaintiff as herein set forth by reason of the action and things performed, done and carried out by defendants herein named or in violation of said Sherman Act and pursuant to Section 15 of said Act.

2. The alleged unlawful acts and violations hereinafter described, including the unlawful monopoly, attempts to monopolize, combinations and conspiracies to monopolize, and contracts, combinations, and conspiracies to restrain trade and commerce among the several States of the United States and among foreign nations, have been, and are, conceived, carried out, and made effective in part within the Northern District of California, Southern Division, and many of the unlawful acts done pursuant thereto have been performed by the defendants, or some of them, and their respective representatives within said District within the three years next preceding the date of the filing of this Complaint. Certain of said defendants have usual places of business in the said district and there transact business, and are within the jurisdiction of the Court for the purpose of service. The interstate and foreign trade and commerce involved in the borax industry, as hereinafter described, is carried on in part within said District and Division.

Description of Plaintiff

3. That plaintiff above named is now, and at all times herein set forth, has been, a corporation organized and existing under and by virtue of the laws of the State of Nevada.

Description of Defendants

4. Borax Consolidated, Ltd., is a corporation organized and existing under the laws of the United Kingdom, with offices [2] and principal place of business at Danes Hill, Oxshott Surrey, England. It owns and operates borate deposits, boracite mines, refineries, railways, factories, and other operating buildings located in the United States, England, France, Austria, Turkey and South America, including the properties of its subsidiaries and affiliates, among which are the Pacific Coast Borax Company and the United States Borax Company hereinafter made defendants.

5. Pacific Coast Borax Company is a corporation organized and existing under the laws of the State of Nevada, with offices and principal place of business in Los Angeles, California; said defendant also maintains an office, agent and place of business in the City and County of San Francisco, State of California. Said defendant is successor to the corporation of the same name incorporated under the laws of the State of New York, but disincorporated in 1937. Defendant Pacific Coast Borax Company mines and operates borate deposits located in Kern County, California, and operates a borax refinery

located in Wilmington, California. The policies, management and activities of the defendant Pacific Coast Borax Company are controlled and directed by the defendant Borax Consolidated, Ltd.

6. United States Borax Company is a corporation organized and existing under the laws of the State of West Virginia, with offices and principal place of business in Los Angeles, California. Defendant United States Borax Company was organized by the defendant Borax Consolidated, Ltd., solely for the purpose of holding title to borate deposits. The policies, management and activities of the defendant United States Borax Company are controlled and directed by the defendant Borax Consolidated, Ltd.

7. American Potash & Chemical Corporation is a corporation organized and existing under the laws of the State of Delaware, with offices and principal place of business in New York, New York. Said defendant owns part of and leases from the United States [3] Department of the Interior most of the remaining part of Searles Lake located in the Mojave Desert in San Bernardino County, California, from which it extracts borax and potash. It also owns and operates a borax refinery at Trona, California. On October 20, 1942, approximately 90% of the shares of stock of the American Potash & Chemical Corporation were vested in the Alien Property Custodian after investigation had disclosed that said stocks was beneficially owned by citizens of the German Reich.

8. Sterling Borax Company is a corporation organized and existing under and by virtue of the laws of the State of Nevada. That subsequent to the purchase of the mine of said Sterling Borax Company by Defendant Pacific Coast Borax Company in 1916, as hereinafter set forth, said Pacific Coast Borax Company became the owner and holder of all the outstanding issued bonds of said Sterling Borax Company, and thereafter become, and ever since has been and now is, the dominating force and control of said Sterling Borax Company.

9. San Bernardino Borax Mining Company is a corporation organized and existing under the laws of the State of Nevada, and is now and has been at all times herein stated a subsidiary of and under the control and domination of said Pacific Coast Borax Company.

10. That the other defendants named herein are named by fictitious names as the true and correct names of said defendants are to plaintiff at this time unknown, and that plaintiff prays that when the true names of said defendants, or any of them, are discovered, such true names may be set forth in the place and stead of said fictitious name or names. That Defendants One Two, Three Four and Five Six are, and each of them is, a corporation organized under and by virtue of the laws of various states, the exact ones of which being to plaintiff, at this time, unknown; that Defendant Seven Eight Company is a co-partnership. [4]

11. Each of the defendants has participated in, and now participates in, the direction and management of various parts of said conspiracy and combination and has authorized, ordered or done some or all of the acts constituting offenses hereinafter set forth: acts alleged in this complaint to have been done by a defendant corporation where authorized, ordered or performed by officers, directors, agents or employees of such defendant corporation, including those persons named herein as defendants. Certain of said defendants, as hereinafter more particularly set forth, have formed a part of said conspiracy and combination since the commencement of the acts and combinations herein set forth and others of said defendants have, from time to time, the exact days of which are to plaintiff at this time unknown, entered into and become a member of said conspiracy and combination.

Definition of Terms

12. "Borax," as used herein, shall be deemed to mean a white crystalline material, soluble in water, slightly alkaline, the formula of which, disregarding the water of crystallization, is $\text{Na}_2\text{B}_4\text{O}_7$. The ordinary commercial form of borax has ten units or equivalents of water of crystallization.

13. The terms "dehydrated borax" or "anhydrous borax," as used herein, shall be deemed to mean borax from which all the water of crystallization has been expelled.

14. "Boric acid," as used herein, means borax treated with a suitable acid, usually sulphuric acid,

which results in the product the chemical formula of which is H_3BO_3 .

15. The term "crude borates," as used herein, shall be deemed to mean unprocessed ores or minerals from which borax or boric acid is derived. The four principal types of crude borates are kernite, tincal, colemanite, and ulexite.

16. "Kernite," as used herein, means a natural borate. Kernite is the purest of the borate ores. It is a sodium borate. [5]

17. The term "tincal," as used herein, means a natural borate ore. Like Kernite, it is a sodium borate.

18. The term "colemanite," as used herein, means a calcium borate ore. Transformation of colemanite to commercial borax requires a chemical injection of a sodium product.

19. The term "ulexite" as used herein signifies a soft, silky fibrous borate mineral. Ulexite is a mixture of calcium and sodium borates.

20. "Lake brine," as used herein, means water of dry lake beds strongly impregnated with salt or other saline substances from which borax may be extracted.

21. The term "refined borax," as used herein, means borax resulting from the processing of any crude borate as above defined, or from the extraction and processing of any lake brines.

22. The term "distributor," as used herein, means one who purchases borax or boric acid from a producer for resale to ultimate consumers.

Nature of Trade and Areas Involved

(a) The Commodity

23. Borax is obtained by refining certain crude borates, and by extraction from lake brines. Boric acid is made from crude borates or borax by treatment with a suitable acid, usually sulphuric acid. Borax is available in several forms, namely crystal or lump borax, coarse granular borax, fine granular borax, powdered borax, and impalpable borax. There is also an anhydrous or dehydrated form of borax, which is borax from which all of the water of crystallization has been expelled.

24. The chief source of borax is crude borates. Approximately 95 per cent of the world's deposits, active and inactive, of commercially valuable crude borates are located in the State of California and the southwest section of the State of Nevada; all of the world's deposits of kernite are located in [6] Kern County, California. Although there are approximately sixty known crude borates in the world, only four contain sufficient boron oxide content to warrant commercial exploitation. These are kernite (sometimes known as rasorite, but hereinafter referred to exclusively as kernite), tincal, colemanite, and ulexite. The commercial value of borate ores is largely determined by the boron oxide content, which averages 50 per cent in the best crude ore, which is kernite. Colemanite is a calcium borate, tincal and kernite are sodium borates. Ulexite is a mixture of calcium and sodium borate. Kernite, the most important of the borate ores, is found only in

the United States, and all of the known United States deposits of kernite, except 10 acres hereinafter referred to, are now owned by the defendant Borax Consolidated, Ltd., through itself or its subsidiary, the defendant United States Borax Company.

25. The other source of borax is lake brine, more than 99 per cent of which is extracted from Searles Lake, located in the Mojave Desert in San Bernardino County, California, by a process of evaporation and fractional crystallization. Approximately one ton of borax is obtained as a co-product of two tons of muriate of potash. This process produces no crude borate. The remaining approximately 1 per cent is produced from Owens Lake, Inyo County, California.

(b) Uses

26. Borax and boric acid have more than two hundred uses. The properties of borax to which its principal uses are related are its strong fluxing ability, that is, its power to promote the fusion of metals or minerals, its mild antiseptic properties, and its mild alkaline properties which make it useful as a buffering agent to neutralize acids or bases without changing their original acidity or alkalinity. Borax and boric acid have been and are strategic chemicals in the war production program of the United [7] States and its Allies, and will be important chemicals in the nation's reconversion program to civilian production. They are important ingredients (in excess of 25 per cent) in the manufacture

of enamels for coating metalware such as bathtubs, sinks, plumbing fixtures, etc. In the manufacture of glass, borax and boric acid acts as fluxes to promote the distribution of the other constituents of the glass. This fluxing quality makes possible the production of glass containing a high percentage of silica and alumina. Borax is particularly useful in the manufacture of heat-resisting glass used in kitchenware, lamp chimneys, and signal lenses. Large quantities of borax and boric acid are used in the production of glazes for tiles, earthenware and china; in the manufacture of adhesives for neutralizing dextrene or casein; in the manufacture of starches, detergents, sizing compounds and metallurgical fluxes. Borax and boric acid are among the best successful fluxes because they restrict the formation of metallic oxides and exert a solvent action on such oxides as are formed. Boric acid is used in the melting of alloys of copper and nickel, and in their recovery from scrap. The flux is used to prevent oxidation and to collect and eliminate foreign matters. Borax is used in aviation instrument panels and in the manufacture of explosives, particularly magnesium bombs; in the manufacture of rubber as an anticoagulant; in the manufacture of optical glasses, airplane and balloon fabrics, and certain distillate motor fuels. It is used in the manufacture of boron carbide crucibles. As an abrasive, boron carbide (B_4C) is second in hardness only to the diamond, and is also an economical source of boron in metallurgical processes, both as a source of boron for alloys and as a powerful

deoxidizing agent. In the leather industry borax is used for soaking, cleaning and neutralizing solutions, and in the textile industry as a buffer in dye-baths and for the degumming of silks. Borax is used in agriculture in the washing of citrus [8] fruits to prevent decay and as a fertilizer. It is used to prevent cracked stems in celery, to prevent heart rot in beets, and to retard the growth of weeds. Borax and boric acid are widely used in pharmaceutical preparations and cosmetics because of their mild antiseptic and detergent properties. They are used in the production of medicated lint, gauze, hair preparations, shampoo powders, permanent wave specialties, talcum and dust powders, tooth powders, skin creams, and other cosmetics, and as constituents of ointments, insect powders, and other preparations. Boric acid is also an ingredient of hypochlorite antiseptic solutions. In the manufacture of coated, glazed, or enameled paper, borax is employed as a solvent for casein since it is a mild alkali and yet capable of giving complete solution at low temperatures. Recent experiments indicate an increased use of borax in the manufacture of borosilicate glass for electric insulation, fluorescent lighting, glass fabrics, glass building blocks, and glass wool for insulation of buildings.

Development of the Industry

27. There are four distinct periods in the history of the production of borax in the United States: first, the period of lake borax, from 1864 to 1872; second, the period of marsh borax, from 1873 to

1887; third, the period of colemanite, from 1887 to 1926; and fourth, the period of kernite and the Searles Lake production, from 1927 to the date of this Complaint.

(1) Lake Borax

28. From 1864 to 1872, commercial production of borax centered mainly in the various California lakes, namely, the Tuscan Springs, Tehama County, California; Pitt River, in Shasta County, California; Borax Lake, on the southeast edge of Clear Lake, California; and Lake Hatchinhama, on the south side of Clear Lake, California. All of these locations contained tincal or natural borax, dissolved in the lake or spring water, or [9] crystallized in the mud at the bottom or sides of the lake. Production from the lake period of the industry came to a sudden close in 1872 with the discovery of so-called marsh borax in Nevada and California. Production of borax from lakes was discontinued since it was more economical to produce it from alkaline marshes.

(2) Marsh Borax

29. From 1873 to 1887, borax was taken from alkaline marshes located in Nevada and California. These marshes contained little or no water. The borax was lodged in surface incrustations produced by the evaporation of saline waters in these undrained reservoirs. The characteristic ore of the marshes was unrefined. The Nevada marshes were located in the northwest part of Esmeralda County

and the southwest corner of Mineral County, east of Yosemite National Park. Production in California during this period, beginning in 1873, was centered in San Bernardino County. Lack of adequate transportation facilities in this area retarded development of the industry. It was necessary to use mule teams made up usually of twenty mules specially selected. The wagons drawn by the mules had a capacity of twelve tons each. Each team pulled two wagons and a tank holding 1200 gallons of water, a total load of 70,000 pounds. It was a ten-day trip through barren desert land to the railroad at Mojave, California.

30. The processing of marsh borax was more economical than the evaporation of lake waters and a greater quantity was produced. In 1873 production increased to 1,000 tons annually, and in 1887 it reached a maximum of 5,500 tons. Colemanite was discovered in 1882 at Death Valley, California. Between that year and 1887, colemanite began to compete with marsh borax. New deposits of colemanite were discovered in the Calico Mountain District, near Daggett, California. In 1887, most of the marshes were abandoned, and from 1887 until 1919 colemanite became the sole source of production of borax in the United States and the principal source from 1919 to 1927.

(3) Colemanite

31. The colemanite phase of the borax industry (1887-1926) was distinguished from the two preceding phases by an abundance of the ore. Crude borate

was produced and sold, as well as refined borax and boric acid. Transportation had ceased to be difficult since the most important of the colemanite mines were located near the junction of the Santa Fe and Union Pacific Railroads at Daggett, California. Beginning in 1922, a substantial amount of borax was produced from the brine of Searles Lake, located in the Mojave Desert in San Bernardino County, California. Throughout this period there was a constant increase in production. In 1926, approximately 92,000 tons of borax were produced from the colemanite mines and approximately 20,000 tons from the brine of Searles Lake.

(4) Kernite and Searles Lake Production

32. In August of 1925, a new borate mineral called kernite was discovered in Kern County, California. In 1927, there was a sharp rise in the production of borax at Searles Lake. These two developments revolutionized the borax industry. Borax production from colemanite ceased entirely. Kernite displaced colemanite as the principal borate ore because production costs were cheaper, the mines were more easily accessible to transportation facilities, and it was superior in quality, massiveness, and purity, and was more easily mined. Due to its peculiar composition, kernite has six fewer equivalents of water than borax, and gains weight in the refining process. In recrystallization, kernite absorbs the six units of water, and hence a ton of kernite ore yields approximately 1.39 tons of borax.

Control of Industry

33. For some years prior to 1929, the exact date of [11] which to plaintiff at this time being unknown, and ever since said date, the world trade in borax and borax products has been and now is completely dominated and controlled by defendants Borax Consolidated, Ltd., and the American Potash & Chemical Corporation and their subsidiaries, all in violation of and contrary to said Sherman Act, and the amendments thereto. The former controlled during said times, and now controls, 95 per cent of the world production of borax from crude borates, including 100 per cent of the world production from kernite, all of which is located in Kern County, California; the latter controls approximately 90 per cent of the world production of borax derived from lake brines, 99 per cent of which comes from Searles Lake located in the Mojave Desert, San Bernardino County, California.

Control of Crude Borates

34. Control of crude borates by defendant Borax Consolidated, Ltd., has been achieved through acquisitions of borate deposits and mines. In 1899, this Company was registered in Great Britain "to acquire the borate and colemanite deposits, boracite mines, railways, factories, etc., in the United States, England, France, Austria, Turkey, and South America of various companies, including Borax Co., Ltd., Pacific Borax and Redwoods Chemical Works, Ltd., Soc. Lyonnaise des mines et lesines De Borax". In the same year it purchased defendant Pacific Coast Borax Company.

35. During the period 1899-1923, defendant Borax Consolidated, Ltd., exercised almost complete control of the borax and boric acid industry. Its subsidiary, defendant Pacific Coast Borax Company, produced approximately 85 per cent of the world supply of crude borates during the period 1899-1906. The remaining 15 per cent was produced by Western Mineral Company from a mine located in Inyo County, California, by Stauffer Chemical Company from low-grade colemanite claims in Ventura County, California, through its control of the Frazier Borate Mining Co., by [12] the American Borax Company which operated a mine at Daggett, San Bernardino County, California, by the Columbus Borax Co. operating mines in Ventura and San Bernardino Counties in California, and by the Palm Borates Co. operating a colemanite mine in San Bernardino County, California. In 1907, defendant Pacific Coast Borax Company, as an incident to opening a colemanite mine at Ryan, Inyo County, California, in the Death Valley region, reduced the price of borax from \$136 to \$100 per ton, with the result, according to the information and belief of plaintiff, that the following competitors were eliminated: Western Mineral Co., American Borax Company, Columbus Borax Co., Palm Borates Co., and the Frazier Borate Mining Company.

36. That plaintiff is further advised and believes, and therefore alleges, that in 1906 the Russell Borate Mining Company of Los Angeles, California, was formed to mine colemanite from depos-

its in Ventura County, California; that this company did not produce until 1912; that in 1913 it ceased operations and was purchased jointly by defendant Pacific Coast Borax Company and the Stauffer Chemical Company.

37. That plaintiff is further advised and believes, and therefore alleges, that in 1908 the Sterling Borax Company of Los Angeles, California, was organized and began production from a colemanite mine located at Lang, Los Angeles County, California; that this mine was purchased by defendant Pacific Coast Borax Company in 1916 and closed.

38. That plaintiff is further advised and believes, and therefore alleges, that in 1913 colemanite was discovered in the so-called Kramer District, Kern County, California, by Doctor John K. Suckow; that these deposits were purchased immediately by defendant Pacific Coast Borax Company, and that by 1916 defendant Pacific Coast Borax Company was the only producer of crude borates in the United States. [13]

39. That plaintiff is further advised and believes, and therefore alleges, that in 1920, new colemanite deposits discovered at White Basin, Clark County, Nevada, were purchased promptly by defendant Pacific Coast Borax Company.

40. That plaintiff is further advised and believes, and therefore alleges, that in 1921 the American Borax Company was organized under the laws of

the State of Nevada for the purpose of producing crude borates from colemanite claims located in that year at White Basin, Clark County, Nevada; that in 1924 this company began production; that in 1925 the Stauffer Chemical Company acquired a controlling interest in the American Borax Company; that the discovery of kernite caused a discontinuance of mining at White Basin; that in 1937 the defendant Borax Consolidated, Ltd., through its subsidiary Pacific Coast Borax Company, purchased the colemanite claims formerly belonging to the American Borax Company, destroyed the underground mining facilities, and closed down the mine.

41. That plaintiff is further advised and believes, and therefore alleges, that in 1920 the West End Chemical Company, of Oakland, California, was formed for the purpose of producing chemicals, principally soda ash, alkali, common salts, and borax; that this company purchased a colemanite mine in the White Basin Area, Clark County, Nevada, in 1921, and began production of borax in 1923, producing until the discovery of kernite in 1926, after which the mine was closed; that defendant Borax Consolidated, Ltd., attempted to purchase these deposits in 1921, but the attempts was defeated when the agent dispatched to purchase the property failed to contact the discoverer before representatives of the West End Chemical Company.

42. That plaintiff is further advised and believes, and therefore alleges, that in 1924 Dr. John K. Suckow discovered additional colemanite in the

Kramer District in Kern County, California [14] and formed the Suckow Chemical Company of Los Angeles, California, to exploit the claim; that the stock in the Suckow Chemical Company was owned 40 per cent by defendant Pacific Coast Borax Company, 25 per cent by Dr. Suckow, and 35 per cent by the Stauffer Chemical Company; that the right to vote the stock of the Stauffer Chemical Company was vested in Dr. Suckow, which gave him control; that Dr. Suckow mined on his deposits in 1924, but in 1925, defendant Pacific Coast Borax Company paid Dr. Suckow \$150,000 for his 25 per cent interest and his voting right in the Stauffer stock, and promptly closed down the mine and dismantled the refinery.

43. That plaintiff is further advised and believes, and therefore alleges, that in 1927 defendant Pacific Coast Borax Company abandoned its colemanite works located in the Death Valley region of southeastern California due to discovery and opening by it of kernite mines located in Kern County, California.

44. That plaintiff is further advised and believes, and therefore alleges, that in 1928 the Western Borax Company of Los Angeles, California, was organized for the purpose of operating kernite mines located near the Kramer District, Kern County, California; that these mines were purchased by defendant Borax Consolidated, Ltd., through its subsidiary, the defendant United States Borax Company, in 1933.

45. That plaintiff is further advised and believes, and therefore alleges, that in 1929 the Suckow Borax Mines Consolidated of Los Angeles, California, was organized to exploit sodium borate (tincal) deposits located in Kern County, California; that these properties were acquired by lease by defendant Borax Consolidated, Ltd., in 1934, and thereafter were operated by defendant Pacific Coast Borax Company; that in December of 1942 the properties were purchased by the defendant United States Borax Company; that with this acquisition, defendant Borax Consolidated, Ltd., and its subsidiaries [15] achieved a complete monopolization of the world's known sodium borate deposits.

46. That plaintiff is further advised and believes, and therefore alleges, that although the discovery of kernite caused a shutdown of the colemanite mines, Borax Consolidated, Ltd., on May 27, 1935, purchased the colemanite mine of the Death Valley Borax Company, which was about to start production, for the sum of \$137,000 and promptly closed the mine.

Control of Lake Brine Borax

47. That plaintiff is further advised and believes, and therefore alleges, that in 1912 the American Trona Company (predecessor of defendant American Potash & Chemical Corporation) was organized for the purpose of extracting borax and potash from the brine of Searles Lake, located in the Mojave Desert, San Bernardino County, California;

that a part of the lake was leased from the United States Department of Interior and a part purchased in fee; that production of borax began in 1919, and reached substantial proportions by 1925, when approximately 18,000 tons of borax were produced.

48. That plaintiff is further advised and believes, and therefore alleges, that in 1926 the American Trona Company was reorganized and became the American Potash & Chemical Corporation; that the entire plant at Searles Lake was rebuilt and with the installation of a new refining unit at Trona, California, in 1927, production of borax at Searles Lake was increased by 108 per cent over 1926; that in 1931, a \$4,000,000 expansion program increased the plant capacity of defendant American Potash & Chemical Corporation by 50 per cent; that by 1937, defendant American Potash & Chemical Corporation was producing approximately 100,000 tons of borax annually, or approximately 30 per cent of the United States total for that year; that it controls, either by lease or by ownership in fee, approximately 85 per cent of the workable area [16] of Searles Lake from which approximately 99 per cent of the world's supply of borax produced from lake brines is obtained.

49. That plaintiff is further advised and believes, and therefore alleges, that in 1930 the Pacific Alkali Company of Los Angeles, California, which had been organized in 1928 to produce soda ash and alkali, began producing borax from Owens Lake, located in Inyo County, California, which it owns;

that the borax production of this company has been negligible, ranging from 400 tons to 2,000 tons annually; that prior to World War II, most of its borax production was sold in export markets; that this company is now producing a small tonnage of borax.

50. That plaintiff is further advised and believes, and therefore alleges, that beginning in 1922, and continuing to date, the West End Chemical Company has leased approximately 15 per cent of the workable area of Searles Lake from the United States Department of Interior for the purpose of extracting alkali, common salts, and borax from the lake brine; that production of borax has been sporadic; that a total of approximately 15,000 tons was produced in its peak year of 1939; that the West End Chemical Company sells its entire output of borax through the Stauffer Chemical Company.

51. That plaintiff is further advised and believes, and therefore alleges, that the Stauffer Chemical Company, of San Francisco, California, was organized in 1895 for the purpose of producing and refining chemicals, particularly sulphuric acid, carbon disulfide, sulphur, cream of tartar, and whiting; that because it produced sulphuric acid, the Stauffer Chemical Company from 1895 to 1925 manufactured boric acid solely for the account of the Pacific Coast Borax Company from borates shipped to Stauffer Chemical Company by Pacific Coast Borax Company for that specific purpose; that it entered the borax industry on its own account in 1901 by securing control of the Frazier Borate Min-

ing Company described [17] heretofore in paragraph 35; that Stauffer Chemical Company refined the crude borates and distributed the refined products. When the Frazier Borate Mining Company ceased operations in 1906, Stauffer Chemical Company purchased an interest in the Sterling Borax Company, described heretofore in paragraph 37; that this source of crude borates lasted until 1915, when the Sterling Borax Company was purchased by defendant Pacific Coast Borax Company; that during the period 1915-1922, the Stauffer Chemical Company had no source of crude borates for producing borax or boric acid for its own account. From 1922 to 1927 it was supplied by West End Chemical Company; and, from 1928 to 1933, by the Western Borax Company; that when the latter company was purchased by defendant Pacific Coast Borax Company in 1933, defendant Pacific Coast Borax Company, as part of the purchase agreement, agreed to supply Stauffer Chemical Company with crude borates for manufacture into boric acid until 1941; that since 1941 the Stauffer Chemical Company has executed successive two-year contracts with defendant Pacific Coast Borax Company for its supply of crude borates to be used solely for the manufacture of boric acid; that since 1933, Stauffer Chemical Company has also purchased all of the borax production of the West End Chemical Company.

52. That plaintiff is further advised and believes, and therefore alleges, that by 1934 and continuing down to the date of the filing of this Complaint

defendant Borax Consolidated, Ltd., and defendant Pacific Coast Borax Company owned and controlled approximately 99 per cent of the world's crude borate deposits and 95 per cent of the world's production of borax from borate minerals, including all of the world's kernite deposits, less 10 acres thereof hereinafter referred to as the "Little Placer", and 100 per cent of production from kernite; that defendant American Potash & Chemical Corporation controlled approximately 90 per cent of the world's production of borax derived from lake brine; that most [18] of the remaining 10 per cent of the borax derived from lake brine is produced by Pacific Alkali Company and West End Chemical Company; that the supply of the latter company is purchased by Stauffer Chemical Company.

53. That plaintiff is further advised and believes, and therefore alleges, that in 1943 approximately 300,000 tons of borax were produced; that of this amount approximately 200,000 tons were produced from the kernite mines in Kern County, California, and approximately 100,000 tons were produced from lake brines, 99 per cent of which was derived from Searles Lake; that until the outbreak of the European War in September 1939, the combined exports of borates from the United States, both crude and refined borax, and boric acid, made by defendants, amounted approximately to 75 per cent of the domestic production; that the principal export markets prior to the War were Great Britain, Germany, France, Belgium, and Japan; that approxi-

mately 60 per cent of the exports from the United States to these countries consisted of crude borates. Prior to September 1939, defendants exported crude borates, refined borax and boric acid from the United States to more than forty foreign countries.

Method of Sale

54. Defendant Pacific Coast Borax Company mines crude borates at mines located in Kern County, California, and ships to its refinery located at Wilmington, California; and to refineries of the defendant Borax Consolidated, Ltd., located at London, England; Dunquerque, France; Port Dundas, Glasgow, Scotland; Barcelona, Spain; and Standlau, Austria, where it is refined to produce borax and boric acid. Defendant Pacific Coast Borax Company is also the selling agent in the United States and Cuba for defendant Borax Consolidated, Ltd., and ships the refined products from the refinery at Wilmington, California, to industrial users in various States of the United States and to industrial users in [19] Cuba, pursuant to contracts of sale. The ore refined at refineries located in London, England; Dunquerque, France; Port Dundas, Glasgow, Scotland; Barcelona, Spain; and Standlau, Austria, is shipped to industrial users in various other foreign countries by defendant Borax Consolidated, Ltd., pursuant to contracts of sale made with such industrial users. Defendants Pacific Coast Borax Company and Borax Consolidated, Ltd., also sell crude borates directly to foreign and domestic industrial users, pursuant to

contracts of sale. Both companies also sell crude borates, refined borax and boric acid to distributors located in the United States and in foreign countries which in turn resell to users.

55. Defendant American Potash & Chemical Corporation extracts borax from the brine of Searles Lake, refines it at its refinery located at Trona, California, near the Lake, and sells and ships it to industrial users located in the various States of the United States, pursuant to contracts of sale. Its selling agent in the United Kingdom and Europe is defendant Borax & Chemicals, Ltd., of London, England. Its selling agent in the Orient, except for China, is Imperial Chemical Industries of London, England, and its Canadian selling agent is the St. Lawrence Chemical Company, Ltd., of Montreal, Canada. All of these selling agencies also sell refined borax and boric acid to distributors which resell to users. Defendant American Potash & Chemical Corporation also sells refined borax and boric acid to distributors located in various States of the United States, which, in turn, resell such products to users.

56. Approximately 90 per cent of all sales of crude borates, refined borax, and boric acid are made in carload lots. All sales of crude borates, refined borax, and boric acid made in the United States in carload lots are made by defendants Pacific Coast Borax Company and American Potash & Chemical Company direct to industrial users or to independent distributors located in the various

[20] State of the United States. These independent distributors in turn resell such products only to those industrial users located in the various States of the United States buying less than carload lots.

Offenses Charged

57. Beginning prior to the year 1929, the exact date being at this time by plaintiff unknown, the defendants, each well knowing all the matters and things hereinbefore alleged, and continuing thereafter up to and including the date of filing of this Complaint, have been and now are engaged in a combination and conspiracy to restrain unreasonably, and pursuant to said combination and conspiracy, have in fact unreasonably restrained the aforesaid trade and commerce in the mining, production, processing, manufacture, distribution, and sale of crude borates, refined borax, and boric acid among the several States of the United States and with foreign nations, and have conspired and combined to monopolize, have attempted to monopolize, and have succeeded in monopolizing such trade and commerce in violation of Sections 1 and 2 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," as amended (15 U.S.C., Sec. 1 and 2), commonly known as the Sherman Act.

58. The aforesaid combination and conspiracy to restrain trade and commerce, the combination and conspiracy to monopolize, attempts to monopolize, and conspiracy to monopolize such trade and com-

merce, have consisted of a continuing agreement and concert of action among the defendants, the substantial terms, purposes, and intent of which have been that defendants:

a. agree to acquire control of approximately 95 per cent of the world's known deposits of borate minerals, including approximately 100 per cent of sodium borate (kernite and tincal) deposits; [21]

(1) by purchase of newly discovered deposits;

(2) by purchase of deposits actively worked by others;

b. agree to acquire by lease or purchase approximately 90 per cent of the world's known lake brines from which borax may be extracted;

c. agree to purchase refining facilities of all competitors who also own deposits of borate minerals;

d. agree to dismantle and close all refining facilities and to close all mines purchased from competitors who work deposits of borate minerals;

e. agree to withhold from the market all colemanite ore where such ore would compete with kernite;

f. agree to permit two United States concerns to produce, refine, buy and sell approximately 5 per cent of the world's supply of refined borax and boric acid on terms dictated by defendants with respect to customers and markets;

g. agree to allocate among themselves the tonnage of crude borates, refined borax, and boric acid that may be sold by each defendant in various nations and in various markets, including the United States market;

h. agree to allocate among themselves consumers of crude borates, refined borax, and boric acid on the basis that the defendant company first supplying a user shall enjoy thereafter the right to sell such user exclusively;

i. agree that each defendant will refuse to sell crude borates, refined borax, and boric acid to customers of any other defendant;

j. agree to reallocate among themselves periodically the amount of tonnage of crude borates, refined borax, and boric acid that may be sold by each defendant in certain nations, in certain markets, and to various types and classes of consumers;

k. agree as to the customers to which certain types of crude borates, refined borax, and boric acid may be sold;

l. agree that no user of crude borates, refined borax, and boric acid may purchase such products except on condition that such user shall not resell or export such products;

m. agree to trace and repurchase any crude borates, refined borax, and boric acid resold or exported by users and to blacklist and boycott such users;

n. agree to permit independent distributors to sell crude borates, refined borax, and boric acid to certain designated customers on terms fixed by the defendants.

o. agree that no sales of refined borax shall be made for packaging by independent distributors;

p. agree that only defendant Borax Consolidated, Ltd., or its subsidiaries shall sell and distribute packaged borax;

q. agree to fix the prices at which crude borates, refined borax, and boric acid will be sold to users and distributors.

- (1) by fixing arbitrary and noncompetitive prices, discounts and conditions of sale on crude borates, refined borax, and boric acid;
- (2) by establishing arbitrary and fixed differentials in the prices to be charged for crude borates, the various types of refined borax, and boric acid;
- (3) by establishing arbitrary and fixed differentials in the prices to be charged users for the same type and quality of crude borates, refined borax, or boric acid based upon the use to which such products are put;
- (4) by fixing a minimum tonnage for a carload of crude borates, refined borax, and boric acid, and selling only on an f.o.b. plant basis, freight allowed to destination;
- (5) by refusing to ship crude borates, refined borax, [23] and boric acid in the United States by any means other than by rail;
- (6) by fixing the prices at which independent distributors of defendants may resell crude borates, refined borax, and boric acid to users to whom defendants permit such independent distributors to resell.

59. During the period of time covered by this Complaint and for the purpose of forming and effectuating the aforesaid combination and conspiracy

to restrain trade unreasonably, combination and conspiracy to monopolize, attempt to monopolize, and actual monopolization of the interstate and foreign trade and commerce hereinbefore alleged, and to destroy competition, the defendants by agreements and concerted action have done the things which as hereinbefore alleged, they conspired to do, and more particularly have done, among others, the following acts and things.

The Borax Industry in 1929

60. In 1929, the following companies were producing crude borates, refined borax, and boric acid in the United States: Borax Consolidated, Ltd., through its subsidiary, Pacific Coast Borax Company; American Potash & Chemical Corporation; Western Borax Company; West End Chemical Company; and Suckow Borax Mines Consolidated. The total production of these companies amounted approximately 95% of the total world production.

61. Distribution and sale of crude borates, refined borax and boric acid in 1929 was made in the following manner: (a) American Potash & Chemical Corporation sold its refined borax and boric acid in the United States market direct to users and to independent distributors who resold to users. Its sales of the same products in foreign markets, except in the Orient and Canada, were made by C. Christopherson Sons, Ltd., of London, England, acting as agent. Sales in the Orient, except China, were made by Imperial Chemical Industries, Ltd., of

London, England, and in [24] Canada by the St. Lawrence Chemical Company of Montreal, Canada, acting as agents. (b) Pacific Coast Borax Company sold crude borates, refined borax and boric acid in the United States market direct to users or to independent distributors who resold to users. It shipped crude borates to refineries owned by its parent Borax Consolidated, Ltd., and located in London, England; Dunquerque, France; Port Dundas, Glasgow, Scotland; Barcelona, Spain; and Standlau, Austria, where they were refined and sold as refined borax and boric acid by Borax Consolidated, Ltd., in all markets of the world except the United States, and Cuba which were supplied by Pacific Coast Borax Company. (c) Suckow Borax Mines, Consolidated, sold crude borates and refined borax direct to users and to independent distributors who resold to users. Its sales were confined to the United States market and Holland. (d) West End Chemical Company sold its entire production of refined borax and boric acid to Stauffer Chemical Company which, in turn, sold in the United States market, South America, the Orient, and in Europe. (e) Western Borax Company sold crude borates to Deutsche Borax Vereingen (hereinafter referred to as DBV), an association of German refiners, which refined the crude borates and sold refined borax and boric acid in Germany and in other European countries. DBV shared equally with Western Borax Company the profits derived from its sales of refined borax and boric acid.

The 1929 Agreement

62. During the year 1929 various meetings were held in England and Europe between Borax Consolidated, Ltd., American Potash & Chemical Corporation, Pacific Coast Borax Company, and DBV, with the result that in the fall of 1929, in either England or Germany, said companies made and entered into an agreement (herein referred to as the 1929 agreement), under the terms of which prices were fixed at which crude borates, refined borax, and boric acid were to be sold; world markets and customers in specific markets [25] were allocated among them; the production of the West End Chemical Company was limited; and the tonnage to be sold in the United States and other markets by Stauffer Chemical Company and the Western Borax Company was restricted. This agreement and several others to be executed subsequently, was to be effective for one year, renewable annually upon three months' notice prior to expiration by mutual agreement among the parties. They were subsequently extended and modified, and, as modified, are still in full force and effect at the time of the filing of this Complaint. From and after September 1, 1939, the parties to the annual renewal of such agreements were Borax Consolidated, Ltd., Pacific Coast Borax Company, American Potash & Chemical Corporation, and Stauffer Chemical Company. The moving parties to the 1929 agreements and their subsequent annual renewals were Borax Consolidated, Ltd., Pacific Coast Borax Company, American Potash & Chemical Corporation, and DBV (the latter until

September, 1939). The Stauffer Chemical Company and Western Borax Company were forced to adhere to such agreements as will be set forth more particularly hereinafter.

63. As part of the 1929 agreements to fix the terms, conditions, and manner of sale and distribution of crude borates, refined borax, and boric acid, price schedules were adopted for sales by defendants of such products to users and to distributors. Resale prices of distributors were also fixed. It was agreed that all sales made in carload lots in the United States would be made by the parties to the agreements, with less than carload lot sales reserved to distributors or jobbers; that a minimum carload would be 30 tons; that freight charges be made on the basis of all-rail, f.o.b. plant, freight allowed to destination; that the United States be divided into zones in which uniform prices would apply regardless of distance between the refinery and destination; that customers located in the same city, or on the same rail route be prohibited from pooling orders so as to obtain carload prices; [26] that a jobber or distributor be defined as a party or concern taking a minimum of two carloads a year.

64. As part of the 1929 agreements it was agreed that no user be permitted to resell or export any crude borates, refined borax, or boric acid; that no independent distributor be permitted to sell to any user except those approved by the parties to the agreements; that no independent distributor be permitted to export crude borates, refined borax, or boric acid. This restriction has been rigidly en-

forced by a system of espionage under which the parties to the agreements attempt to locate and repurchase any crude borates, refined borax, or boric acid sold contrary to the provisions of the agreements set out in this paragraph. Any user or distributor so selling is blacklisted and boycotted.

65. As part of the 1929 agreements, the parties agreed to allocate among themselves world markets for crude borates, refined borax, and boric acid on the basis of tonnage, customers, and types of use to which such products are put; to divide customers among themselves on the basis that the first supplier offering crude borates, refined borax, and boric acid would thereafter enjoy the exclusive right to supply such user, that no party to the agreement would supply any customers previously supplied by any other party to the agreement, that no party to the agreement would solicit the customers of any other party to the agreement, that no party to the agreement would supply any customers with a new borax product if any other party to the agreement was unable to offer the same product to users in the same general industry.

66. That plaintiff is informed and believes and therefore alleges, that said 1929 agreement constituted a reduction to writing of the previous verbal and written agreements, understandings, combinations and conspiracies of defendants and, from time to time, made and entered into by said defendants during the years previous to the making and entering into of said agreement of 1929.

67. That all of said combinations and conspiracies, acts and things complained of hereinbefore and hereinafter in this [27] complaint set forth, were and are continuing conspiracies and each separate thing and act alleged herein and performed by the defendants, or some of them, or any of them, have been and are now acts, things and combinations contributing to and forming a part of said continuing conspiracy.

68. That pursuant to said 1929 agreement and to said prior conspiracies, agreements, combinations and understandings, defendants, or some of them, proceeded to, and did take, steps and means to eliminate through purchase or otherwise, various competitors of said defendants, not parties to said conspiracy, combination or agreement, including plaintiff as well as the Western Borax Company, the Suckow Borax Mines Consolidated, the Stauffer Chemical Company, the Pacific Alkali Company and other companies, the exact names of which are to plaintiff at this time unknown.

Dehydrated Borax

69. In 1934, the American Potash & Chemical Corporation perfected a process for the manufacture of dehydrated borax. No sale of such product could be made under the terms of the 1929 agreement, as modified, since other parties to the agreement were unable to offer a similar product. In the fall of 1934 and the spring of 1935 a series of meetings were held in Berlin, Paris, and London between

representatives of Borax Consolidated, Ltd., American Potash & Chemical Corporation and DBV, at which the following agreement with respect to the sale of dehydrated borax was made: allocation of specific customers to whom American Potash & Chemical Corporation might offer dehydrated borax; allocation of the total tonnage of dehydrated borax which American Potash & Chemical Corporation might sell annually in specific markets; agreement by American Potash & Chemical Corporation to furnish other suppliers with dehydrated borax for resale to customers to be agreed upon; the fixing of an arbitrary price at which dehydrated borax would be sold, the price to be fixed at such level as to preserve the [28] prices agreed upon with respect to refined borax; agreement by American Potash & Chemical Corporation to license DBV under patents for the manufacture of dehydrated borax; agreement to reallocate customers using refined borax so as to preserve market allocations agreed upon, in those instances where Pacific Coast Borax Company, Borax Consolidated, Ltd., or DBV lost the business of any customers as a result of purchase by them of dehydrated borax.

70. Since the beginning of World War II, the purchasing commissions of various Allied Governments, including Great Britain, Australia, and South Africa, have sought to buy dehydrated borax since it requires a smaller amount of shipping space than either crude borates, refined borax, or boric acid. Borax Consolidated, Ltd., Pacific Coast Borax Company, and American Potash & Chemical

Corporation refused most of such offers to buy because of the fear that the sale of dehydrated borax might endanger the world price structure in effect on crude borates, refined borax, and boric acid.

Effects of the Conspiracy

71. The agreements and concerted actions of the defendants alleged in this complaint, both hereinbefore and hereinafter, pursuant to and in furtherance of the conspiracies hereinbefore and hereinafter alleged in this Complaint, have had the effect, as intended by the defendants, of fixing the terms, conditions, and manner in which crude borates, refined borax, boric acid and kernite, are mined, produced, manufactured, distributed, and sold in the United States and foreign countries; of channelizing the system of distribution and sale of such products throughout the United States and in foreign countries; of fixing prices on such products sold to industrial users, as well as resale prices on such products when sold to industrial users, independent distributors of defendants, as well as other terms and conditions of resale; of monopolizing [29] virtually 100% of the world's supply of borate minerals, including 100% (except said "Little Placer") of the world's known deposits of the most valuable, sodium borate (kernite and tincal); of monopolizing approximately 90% of the world's supply of refined borax produced from lake brines; of determining the use to which refined borax and boric acid may be put, as well as the conditions under which they may be used.

As to the Plaintiff

72. As aforesaid, plaintiff is a corporation incorporated and existing under and by virtue of the laws of the State of Nevada. It was incorporated by G. B. Burnham and others who had previously been engaged in mining and chemical ventures. G. B. Burnham held a certain potash lease from the United States government at Searles Lake, San Bernardino County, California, under the terms of "An act to authorize the Exploration for and Disposition of Potassium" approved October 2, 1917. Such lease was dated the 9th day of September, 1918, and covered 2280 acres. On or about the 1st day of January, 1918, said Burnham entered into a tentative agreement with defendant, Pacific Coast Borax Company, to develop the Burnham Solar Process using its patented land at Searles Lake for such purpose. On or about the 24th day of July, 1918, said Burnham entered into a formal agreement with defendant, Pacific Coast Borax Company, granting it an option for the exclusive license to recover potash and other products by the Burnham Solar Process, at which time and for some time previously patent applications thereon were pending, and which patent applications were subsequently granted and patents issued. It was agreed in said agreement that in the event Pacific Coast Borax Company exercised its option, it would use the processes for the production of potash and other products as extensively as might be commercially practicable insofar as suitable land therefor was available; it was also to pay said

Burnham a royalty of 15 per cent from the net [30] profit derived from the use of said processes;

That on or about the 21st day of September, 1918, said Pacific Coast Borax Company entered into an agreement with said Burnham looking toward the financing of his said lease at Searless Lake and, in this connection, furnished a bond of \$18,000.00 to the United States government to guarantee satisfactory performance of said lease on the part of said Burnham; the land in said lease so held by said Burnham was especially suitable for solar evaporation reservoirs;

On November 11, 1918, the then pending world war came to an end at which time the price of potash began to decline, by reason of which it became necessary to recover, in addition, borax and other chemicals from Searles Lake brine in order to effect an economical recovery of the chemicals in that deposit;

That on the 1st day of May, 1920 the existing agreements of July 24, 1918, and September 21, 1918, between said Burnham and said defendant Pacific Coast Borax Company, were cancelled by reason of the fact that said defendant did not desire to produce borax and other minerals under the terms of the government lease held by said Burnham due to the fact that by the terms of said lease, the price of borax to be produced from said property would be subject to regulation by the President of the United States. Thereafter defendant San Bernardino Borax Mining Company, a subsidiary of defendant Pacific Coast Borax Company, applied to

the Federal Government for a reservoir site upon 3,100 acres of land upon the public domain on the south-west side of Searles Lake, together with incidental rights of way for pipe lines. In said application said San Bernardino Borax Mining Company stated under oath that "the commercial solution of the Searles Lake potash problem is now believed to lie in the development of a process of solar evaporation. This process requires broad areas of shallow ponds with the necessary pipe line connections." Such description covered the [31] solar process developed by said G. B. Burnham. At said time said San Bernardino Borax Mining Company owned 2,240 acres of patented land on the north-west side of said lake; said Burnham and other government lessees at said Searles Lake thereupon, protested the granting of said reservoir site and such protest was thereafter sustained;

73. That plaintiff, Burnham Chemical Company, was incorporated under the laws of the State of Nevada on or about the 30th day of March, 1921, with a capital stock of \$100,000.00. To this company said Burnham assigned his said lease and his patented solar evaporation process for recovering various chemicals; that within the next 14 months said plaintiff invested approximately \$150,000.00 in the development of the properties covered by said lease, but, finding that additional capital was necessary, the capital stock of plaintiff was, on or about April 7, 1924, increased to \$10,000,000.00 with 10,000,000 shares of stock at a par value of \$1.00 per share. That interim certificates and the capital stock

of said company were sold to the public during the last half of the year 1922 and the years 1923 and 1924 and up to June 20, 1925, within which time said plaintiff received from the sale of its said stock and invested the same in the development, operation and maintenance of said properties and the business in connection therewith, a sum in excess of \$600,000.00; that said investments by said plaintiff included real estate, buildings, machinery and equipment, pipe lines and water storage, ponds, ditches, wells and equipment, roadways and railroad sidings, power and telephone lines, trucks, tractors, autos and other automotive equipment, furniture and fixtures, overhead and general expenses and costs of experimental and research work;

That on or about the 20th day of June, 1925, a postoffice fraud order was issued against plaintiff and said Burnham as President, and all mail sent to said plaintiff at its office in Reno, Nevada, was ordered returned to the sender; that said fraud [32] order was based solely upon the ground that the patented solar processes transferred by said Burnham to said company were not feasible and would not operate successfully; that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes

and therefore alleges, that said activities on the part of said Government official were done on behalf of said defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease; that said activities of said representative were not discovered by plaintiff or any of its officers until on or about October, 1926;

That at the time of the issuance of said fraud order and for some time prior thereto, plaintiff had been producing and selling certain packaged borax under the trade name "Cinderella" in competition with the product known and sold generally under the trade name of "Twenty-Mule Team" borax and produced and distributed by defendant Pacific Coast Borax Company. That the sale of said Cinderella was handled in large part by mail and was extensively sold in the inter-state commerce but, upon the issuance of said fraud orders, plaintiff was prevented from receiving through said mails the said orders for said packaged borax and was obliged to commence the production and sale of borax in carload lots, which operation it carried on extensively in inter-state and foreign commerce until sometime after defendants, pursuant to said combination and conspiracy and in fraud of plaintiff and in order to eliminate plaintiff as a competitor; reduced the price of borax from \$60.00 per ton f.o.b. Searles Lake, to \$20.00 per ton and [33] subsequently, through various other cuts in price, to the sum of \$18.00 per ton; that said first cut was

made during the month of June, 1928, and by the end of 1928 the price was reduced as aforesaid to \$18.00 per ton; at said time the production of plaintiff's plant was approximately 400 tons per month as against a production of approximately 10,000 tons per month made by defendants; that the cost to plaintiff for production of said borax was approximately \$26.00 a ton and altogether approximately 1,400 tons of borax were produced by it at said cost of \$26.00 a ton, with the result that plaintiff was losing a large amount of money due to said continued reduction in price of said borax, and was therefore obliged to shut down and close its plant in January, 1929, after which time defendants, owing to their control of the production of borax, increased by degrees the price of borax until it returned to the price of approximately \$50.00 a ton; that up to January, 1933, plaintiff had invested \$1,168,564 in the development of its leased property and patented process and its business operations in connection therewith.

74. That upon the issuance of said fraud order, plaintiff protested to the postoffice department against the same and demanded its removal but was unsuccessful in said endeavors to cause the same to be removed, with the result that ultimately, and on or about the month of September, 1925, plaintiff commenced an action in the United States District Court for the District of Nevada to enjoin said postal authorities and the postmaster at Reno, Nevada, from enforcing said fraud order or pro-

ceeding thereunder; that an amended complaint in said action was filed there after during the month of April, 1926; an order to show cause was issued in said action directed to the defendants ordering them to show cause, if any they had, why the Court should not make an order prohibiting them from acting under said fraud order; that due to [34] the crowded calendar of said Court and to the illness of the counsel of plaintiff and to the necessity of properly securing the evidence to be presented on said hearing and for various other causes, the hearing of said order to show cause was not had until late in the year 1929; that during the month of February, 1930, the said Court granted the prayer of plaintiff and enjoined said postal authorities and said postmaster at Reno, Nevada, from preceeding further under said fraud order and from retaining or refusing to deliver mail addressed to said plaintiff;

75. That in May, 1929, said Burnham called upon C. B. Zebriskie, the manager of defendant Pacific Coast Borax Company, at its office in New York City, and protested against the said cuts made by defendants in the price of borax and charged said defendants with as doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants; that at said time said Zebriskie denied the said charges of said Burnham and claimed that such cuts were made solely by reason of the discovery of kernite at the Kramer Borax Fields in Kern County, California,

(and which discovery and development is more particularly hereinafter set forth and described) and further stated that defendants had no desire or intention to injure or damage plaintiff; that said Burnham and said plaintiff, believing the statement of said Zebriskie as to the good faith of defendants and the lack of their desire to injure plaintiff, accepted said statements of said Zebriskie as being true; that in truth and fact said statements of said Zebriskie were false and fraudulent and made with the intent and for the purpose of lulling plaintiff into inactivity and in a further endeavor to eliminate plaintiff as a competitor; that the falsity of said statements was not discovered by plaintiff or its officers until on or about the fall of 1944 and upon the commencement of the action by the United States versus certain defendants [35] herein filed in the United States District Court for the Northern District of California, Southern Division, on September 14, 1944, and numbered therein No. 23690-G.

76. That, as aforesaid, the said plant and business of plaintiff was shut down and closed on or about January, 1929, for the reasons herein stated, and thereafter plaintiff struggled on as best it could to survive, but ultimately it was obliged to default in the payment of its rentals due under said Searles Lake lease with the result that the United States of America, as lessor, cancelled said lease and retook possession of said lands and buildings and permanent installations thereon; that thereafter certain

stockholders of plaintiff, in an endeavor to save the situation, applied to said United States government for a lease upon said premises and equipment; said application was subsequently denied and thereafter said lease and improvements were offered for bid, at which time defendant, American Potash and Chemical Company, bid for said lease and was given the same for the sum of approximately \$130,000; (said lease contained certain additional land) thereupon plaintiff was eliminated from further participation in said Searles Lake holdings at a loss and damage to itself of \$1,168,564.00.

Little Placer Claim

77. That, on or about the month of August, 1925, sodium borate (later called kernite), was discovered in the Kramer Borax Fields in Kern County, California; thereafter certain development work was done in said fields by various employees of defendants, Pacific Coast Borax Company and United States Borax Company, with the result that on or about September 11, 1926, and at various times thereafter, the said agents or employees of said defendants filed applications for mineral patents upon, or otherwise obtained all of said Kramer Borax Fields except ten acres thereof, known thereafter as the "Little Placer Claim", or "Little Placer"; that [36] in said applications the United States Government was not advised of said discovery of sodium borate in said fields; that subsequent to September, 1926, a patent was issued to said applicants in pursuance of their said application.

78. As set forth in paragraph 71 of this Complaint, the defendants, Borax Consolidated, Ltd., and Pacific Coast Borax Company, have controlled since 1934, and now control, all of the world's known kernite deposits except ten acres thereof, known as said the "Little Placer Claim". Ever since June of the year 1928, plaintiff has been endeavoring to secure a lease from the said United States Government upon said "Little Placer" under and by virtue of the laws appertaining thereto, but all of such endeavors of plaintiff have been contested, fought and blocked by the actions of the defendants herein in pursuance to the said unlawful plan and conspiracies of said defendant to own, control and market all borax in all its forms and products, in all the world, and to prevent competition therein and to that end, to drive plaintiff from all activities and business in the field of borax and its ownership, production and sale;

That the facts of said endeavor of plaintiff to secure said lease upon said "Little Placer", and the opposition of defendants thereto, is as follows:

That, on or about June 1, 1928, Burnham Chemical Company, plaintiff herein, filed application for Sodium Prospecting Permit Los Angeles 045676 for certain lands, including the SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 24, T. 11 N, R. 8 W, SBM, Kern County, California, known as the "Little Placer";

On August 1, 1928, the defendant, United States Borax Company, filed mineral application Los Angeles 045946 for the said SW $\frac{1}{4}$ of SW $\frac{1}{4}$ of NE $\frac{1}{4}$ of Section 24;

On December 23, 1928, the Commissioner of the General Land Office directed a hearing between said Burnham Chemical Company [37] and said mineral applicant, in which the Government intervened, for the purpose of determining whether or not said land was valuable for sodium in one of the forms described in the Leasing Act of February 25, 1920, and whether that fact was known on the date of said mining location.

On February 9, 1929, part of application 045676 of said Burnham Company for a prospecting permit was rejected by the Commissioner because of the report of the Geological Survey that the land contained sodium salts in commercial quantities and was subject to entry only under lease. Thereafter, said Burnham Company filed its application, Los Angeles 046681, for a sodium lease on certain lands, including a sodium lease upon said "Little Placer", which application was suspended by reason of conflict with said mineral application;

The said hearing directed as above was held in June and July of 1929, and as a result thereof the Department, on March 8, 1933, affirmed concurring decisions below in favor of said mineral claimant and held that the deposits found in said land were not within the purview of section 23 of the Act of February 25, 1920, prior to its amendment;

On May 3, 1933, the Commissioner advised the Register at Los Angeles that the Departmental decision of March 8, 1933, had become final; that Sodium Lease Application 046681 was finally rejected; and that Mineral Application 045946 was released

from suspension. Final certificate issued on the mineral application August 1, 1933;

On May 17, 1937, the Commissioner directed adverse proceedings against mineral entry 045946, charging, in effect, that said land contained valuable deposits of sodium as described in the Act of February 25, 1920, and that discovery was not made until September 19, 1927, at which time the deposits were known to exist, which prevented a location being made thereon under the mining laws; [38]

On October 15, 1937, said Burnham Chemical Company made application for reinstatement of its application for Sodium Lease 046681 upon the ground that the Department had not issued patent to the land and had decided that its action in denying the sodium lease was erroneous for the reason that said land was known to contain borates of sodium, and that the applicant was entitled to priority. On the same day, said Burnham Company made similar application for reinstatement of its application for Prospecting Permit 045676;

A hearing upon the charges preferred by the Commissioner, as above stated, was held by the Register in February and March, 1938, and on October 6, 1938, said Register rendered his decision sustaining the charges and recommending that said mineral entry be cancelled. Said mineral claimant appealed, and the matter was pending before said Commissioner until November 21, 1941, when said appeal of said mineral claimant was denied and the mineral entry was held for cancellation.

Thereafter said mineral claimant appealed from said decision of said Commissioner to the Secretary of the Interior who in turn and upon April 28, 1943 affirmed said Commissioner's decision and pursuant thereto said mineral application was cancelled; that thereupon said mineral applicant petitioned for a rehearing which was denied upon the 31st day of July 1944. That in due course thereafter Defendant United States Borax Company filed an action in the District Court of the United States for the District of Columbia, entitled United States Borax Company, a corporation, Plaintiff, versus Harold L. Ickes, Secretary of the Interior, Defendant, and numbered Civil Action No. 25789, to enjoin said Secretary of the Interior from cancelling said Little Placer Mineral Entry; said defendant in due course filed his motion for summary Judgment and which motion is now pending.

79. That, on or about May 11, 1939, plaintiff filed with [39] the General Land Office, Department of Interior, Washington, D. C., a

“Petition for Consideration of Application for Reinstatement of Application for Sodium Prospecting Permit Los Angeles 045676 and of Application for Sodium Lease Los Angeles 046681 of Burnham Chemical Company in Connection with Disposition of Appeal of Mineral Applicant in M. E. Los Angeles 045946 of United States Borax Company.”

That said Petition is still pending;

80. That all of the actions and activities of the defendants, or some of them, in contesting the said application of plaintiff for said sodium lease upon said "Little Placer", were performed and carried out by said defendants for the purpose of preventing plaintiff from securing said lease upon said "Little Placer", and through which desired lease plaintiff would have been able to enter into competition with defendants in the production, manufacture and sale of borax in its various forms.

81. That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said conspiracies, plans and combinations hereinbefore in this complaint set forth and described and with the intent and purpose of controlling and dominating, throughout the world and in interstate commerce, the mining, production and sale of borax in all its various forms and products and with the intent and purpose of injuring and destroying the plaintiff's activities as herein set forth and removing plaintiff as a competitor of defendants, or some of them, in the said mining, production and sale of borax in all its forms; that due to said intents, purposes and acts of defendants, plaintiff has been damaged in the sum of \$1,168,564, neither the whole nor any part of which has been paid plaintiff.

82. That, by the provisions of U.S.C.A.-T 15, Sec. 15, plaintiff is entitled to have and recover

treble damages for the losses and injuries inflicted upon it by defendants as herein set forth, and therefore alleges that it is entitled to recover, and [40] there is due it, from defendants, three times the amount of said damages, and so, as aforesaid, suffered by it, together with a reasonable attorney's fee and cost also provided for in said U.S.C.A.-T 15, Sec. 15.

Wherefore, plaintiff prays:

1. Judgment against defendants in the sum of \$1,168,564.

2. That said amount of damages, or any amount of damages allowed or awarded plaintiff herein, be trebled, as provided for in U.S.C.A.-T 15, Sec. 15.

3. For interest.

4. For reasonable attorney's fees as provided for in U.S.C.A.-T 15, Sec. 15.

5. For costs of suit.

6. For such other and further relief as to this honorable court it seem fit and proper.

/s/ STERLING CARR,

Attorney for Plaintiff.

[Endorsed]: Filed July 3, 1946. [41]

[Title of District Court and Cause.]

MOTIONS OF DEFENDANT UNITED STATES
BORAX COMPANY TO QUASH SERVICE
OF SUMMONS AND TO DISMISS FOR
IMPROPER VENUE AND FOR LACK OF
JURISDICTION OVER THE PERSON OF
DEFENDANT, TO DISMISS FOR FAIL-
URE TO STATE A CLAIM UPON WHICH
RELIEF MAY BE GRANTED, TO DISMISS
BECAUSE THE ACTION IS BARRED BY
THE STATUTE OF LIMITATIONS AND
TO STRIKE

United States Borax Company, named as a defendant herein, appearing specially for the sole purpose of making these motions, hereby moves the court:

I.

To quash purported service of summons and to dismiss the action as against it for improper venue, that is, on the ground that United States Borax Company may not be sued in the Northern District of California because (a) jurisdiction of this Court is invoked solely on the ground that the action arises under the Constitution and laws of the United States, and (b) at the time of the commencement of this action the said United States Borax Company was, ever since has been, and now is, a corporation incorporated under the laws of the State of West Virginia and an inhabitant thereof, was at no time mentioned above and is not a resident or inhabitant of the Northern District of California or found in the Northern District of California, or transacting

business in the Northern District of California, and at no such time has had or now has an agent in the Northern District of California, all of which more clearly appears in the accompanying affidavit of S. M. Nelson, and in the copies, certified by the Secretary of State of California and attached to said affidavit, of the "Statement and Certificate of [42] United States Borax Company, a West Virginia corporation, of change of location of its principal office and of new address of its agent for service of process" filed with said Secretary of State on October 4, 1938, and of the certificate of the Secretary of State of the State of West Virginia, filed with the Secretary of State of California on December 13, 1943.

II.

In the alternative, and if the foregoing motion is denied, to dismiss the action as against it on the ground that the complaint fails to state a claim on which relief can be granted.

III.

In the alternative, if the motion to dismiss for improper venue and lack of jurisdiction is denied, to dismiss the action as against it on the following grounds, severally:

1. That the action is barred by the Statute of Limitations.

2. That the action is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the right of action set forth in the complaint did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years. [43]

5. That the right of action set forth in the complaint did not accrue within three years next before September 14, 1944 but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942 but accrued, if at all, prior to said date.

IV.

In the alternative, and if none of the foregoing motions is granted, to strike from the complaint the allegations of each of the paragraphs of the complaint listed below, and severally each and every one of the allegations contained in said paragraphs, on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All of paragraph 2 of the complaint.
2. All of paragraph 26 of the complaint.
3. All of paragraph 27 of the complaint.
4. All of paragraph 28 of the complaint.
5. All of paragraph 29 of the complaint.
6. All of paragraph 30 of the complaint.
7. All of paragraph 31 of the complaint.
8. All of paragraph 34 of the complaint.

9. All of paragraph 35 of the complaint.
10. All of paragraph 36 of the complaint.
11. All of paragraph 37 of the complaint.
12. All of paragraph 38 of the complaint.
13. All of paragraph 39 of the complaint.
14. All of paragraph 40 of the complaint.
15. All of paragraph 41 of the complaint.
16. All of paragraph 42 of the complaint. [44]
17. All of paragraph 44 of the complaint.
18. All of paragraph 45 of the complaint.
19. All of paragraph 46 of the complaint.
20. All of paragraph 49 of the complaint.
21. All of paragraph 50 of the complaint.
22. All of paragraph 51 of the complaint.
23. All of paragraph 52 of the complaint.
24. All of paragraph 53 of the complaint.
25. All of paragraph 54 of the complaint.
26. All of paragraph 55 of the complaint.
27. All of paragraph 56 of the complaint.
28. All of subsection (a) of paragraph 58 of the complaint.
29. All of subsection (c) of paragraph 58 of the complaint.
30. All of subsection (d) of paragraph 58 of the complaint.
31. All of subsection (e) of paragraph 58 of the complaint.
32. All of subsection (g) of paragraph 58 of the complaint.
33. All of subsection (h) of paragraph 58 of the complaint.
34. All of subsection (j) of paragraph 58 of the complaint.

35. All of subsection (k) of paragraph 58 of the complaint.
36. All of subsection (l) of paragraph 58 of the complaint.
37. All of subsection (m) of paragraph 58 of the complaint.
38. All of subsection (n) of paragraph 58 of the complaint. [45]
39. All of subsection (o) of paragraph 58 of the complaint.
40. All of subsection (i) of paragraph 58 of the complaint.
41. All of paragraph 61 of the complaint.
42. All of paragraph 62 of the complaint.
43. All of paragraph 63 of the complaint.
44. All of paragraph 64 of the complaint.
45. All of paragraph 65 of the complaint.
46. All those portions of paragraph 68 of the complaint beginning with the word "various" in line 9 on page 28 and running to the end of said paragraph, with the exception of the word "plaintiff" in line 11.
47. All of paragraph 69 of the complaint.
48. All of paragraph 70 of the complaint.
49. All of paragraph 71 of the complaint.
50. All of paragraph 72 of the complaint, excluding the first three sentences thereof.
51. That portion of paragraph 73 of the complaint appearing on page 33 thereof and reading as follows:

"that said fraud order was brought about largely through protest and demand of a highly

placed Federal Government representative who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes and therefore alleges that said activities on the part of said government official were done on [46] behalf of said defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease."

52. All of paragraph 77 of the complaint.

53. All of paragraph 78 of the complaint.

54. All of paragraph 79 of the complaint.

55. All of paragraph 80 of the complaint.

56. All of paragraph 81 of the complaint.

Each of the foregoing motions is based on all the pleadings and papers on file herein, including this written motion. The motion to quash service of summons and dismiss the action for improper venue is also based on the accompany affidavit of S. M. Nelson, and the copies, certified by the Secretary of State of California, and annexed to said affidavit, of the "Statement and Certificate of United States Borax Company, a West Virginia Corporation, of change of location of its principal office and of new address of its agent for service of process" filed with said Secretary of State on October 4, 1938, and of the certificate of the Secretary of State of the

State of West Virginia filed with the Secretary of the State of California on December 13, 1943. The other motions will also be based on the accompanying affidavit of Moses Lasky and Exhibits 1 to 5 inclusive, attached to said affidavit, being photostatic copies of certain original records on file in the United States District Court for the District of Nevada, in that certain case entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, Plaintiffs vs. George F. Smith, Postmaster of the [47] United States, in charge of the Post Office at Reno, Nevada," Equity No. E. 75, as follows: "Amended Complaint" filed April 14, 1926, "Affidavit in Support of Motion for Temporary Injunction" executed by George B. Burnham and filed January 15, 1930, a certain document marked in said cause Defendants' Ex. F., a certain "Stipulation" dated January 14, 1930 and filed January 15, 1930, and a certain Post Office Fraud Order No. 3006.

Dated: San Francisco, October 29, 1945.

NEWLIN, HOLLEY,

SANDMEYER & COLEMAN,

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

Attorneys for defendant
United States Borax
Company.

(Admission of Service Noted.)

[Endorsed]: Filed Oct. 29, 1945. [48]

[Title of District Court and Cause.]

AFFIDAVIT OF S. M. NELSON IN SUPPORT
OF MOTION OF DEFENDANT UNITED
STATES BORAX COMPANY TO DISMISS

State of California,
County of Los Angeles—ss.

S. M. Nelson, being first duly sworn, deposes and says:

That he is now and continuously since October 1, 1943, has been the Secretary of United States Borax Company, a corporation, one of the defendants in the above-entitled action.

That in December 1899, United States Borax Company was incorporated under the laws of the State of West Virginia and thereafter and prior to January 1901, said corporation complied with all state laws of the State of California with reference to foreign corporations doing business in the State of California, and continuously thereafter has been and now is duly authorized and empowered to do intrastate business in the State of California. That prior to the year 1938, said corporation changed its principal office and place of business in California to the City of Los Angeles, in the County of Los Angeles, State of California, and thereafter and in the year 1938 said corporation filed with the Secretary of State of California a written statement setting forth the location and address of its principal office within the State of California, to wit, 510 West Sixth Street, in the City of Los Angeles,

County of Los Angeles, State of California; the name of a person residing within the State of California upon whom process directed to such corporation may be served and his complete business address, to wit, C. R. Dudley, 510 West Sixth Street, Los Angeles, California, and said corporation's irrevocable consent to such service and to service of process on the Secretary of State if said agent or his successor be no longer authorized to act or cannot be found at the said address. That on the 8th day of September, 1943, the Articles of Incorporation of said corporation were amended at a meeting of the stockholders of said corporation regularly held on said date, at which meeting a majority of the issued and outstanding voting stock of said corporation was represented and voted for said resolution; that by said amendment the principal office and place of business of said corporation [49] was changed to and fixed at the City of Los Angeles, State of California. That a copy of said resolution so amending the Articles of Incorporation of said corporation, certified under the signature of the Vice President of said corporation and the corporate seal of said corporation, was filed with the Secretary of State of the State of West Virginia. That a copy of said amendment to the Articles of Incorporation of said corporation, duly certified by the Secretary of the State of West Virginia, was filed with the Secretary of the State of California, on or about the 13th day of December, 1943, and that a copy thereof, certified by the Secretary of State of the State of California, was filed on or about De-

ember 17, 1943, with the County Clerk of the County of Los Angeles, the county in which said corporation had and has its principal place of business in the State of California, and in December, 1943, like certified copies of said amendment were filed with the County Clerks, respectively, of the Counties of Kern and Inyo, in the State of California, the only two counties in said state in which said corporation owns any real property.

The United States Borax Company is the owner and holder of certain unpatented mining claims in the Counties of Kern and Inyo, State of California. That none of said mining claims are operated except for the performance of required assessment work thereon. That said corporation, as lessee, is the owner and holder of a mineral lease from the State of California, known as State Mineral Lease No. 15, covering certain real property in the County of Inyo, State of California. Said corporation operates the property covered by said mineral lease and produces borate ore therefrom. That since October 1, 1943, said corporation has owned no real property in the State of California other than in the Counties of Kern and Inyo in said state, and since said date said corporation has owned or possessed no real or personal property in the State of California other than in the Counties of Kern, Inyo and Los Angeles in said state. That continuously since 1943, the principal office and place of business of said corporation and its principal office and place of business in the State of California has been and now is in the City of Los Angeles, County of Los

Angeles, State of California, and that all of its records and books have been and now are there located. That the officers of said corporation consist of a President, Vice President, Secretary and Treasurer. That continuously since 1943, all of said officers have been and now are residents of the County of Los Angeles, State of California, and perform their duties as such officers of said corporation in said County of Los Angeles. That [50] the only business and activities in which said corporation engages in the State of California is the ownership and assessment work on the unpatented mining claims in the Counties of Kern and Inyo, the mining and production of borate ore from the property in the County of Inyo covered by the California state mineral lease, and the handling of the business affairs of said corporation in the County of Los Angeles. That most of the borate ore mined in Inyo County, California, is shipped from said county to points in other states. That a small amount of said borate ore is shipped to and sold in the County of Los Angeles, State of California.

That since October, 1943, United States Borax Company has had and now has no office or place of business within the boundaries of the Judicial District of the Northern District Court of the United States nor in any of the Counties of Del Norte, Siskiyou, Modoc, Humboldt, Trinity, Shasta, Lassen, Tehama, Plumas, Mendocino, Lake, Colusa, Glenn, Butte, Sierra, Sutter, Yuba, Nevada, Sonoma, Napa, Yolo, Placer, Solano, Sacramento, El Dorado, San Joaquin, Amador, Calaveras, Stanislaus, Tuol-

umne, Alphine, Mono, San Francisco, Marin, Contra Costa, Alameda, San Mateo, Santa Clara, Santa Cruz, Monterey or San Benito, in the State of California. That said corporation does not now have nor has it any time since October 1943, had any officer or employee resident of or located in said Northern Judicial District, nor in any of said counties. That said corporation does not now and has not since October, 1943, carried on any business in any of said counties. That on July 5, 1945, said corporation shipped from Inyo County, California, to Selby, California, one carload of crude borate ore. That said shipment was made pursuant to an order therefor received by said corporation from New York City, New York. That except for said one shipment said defendant corporation has not shipped any ore or other products into any of the counties hereinabove named subsequent to October, 1943.

That at all times since 1938, C. R. Dudley has been and now is the designated agent of United States Borax Company upon whom process directed to said corporation may be served. That at all times since 1938, said C. R. Dudley has been and now is a resident of the County of Los Angeles, State of California, and at all of said times his business address has been and now is 510 West Sixth Street, Los Angeles, California. [51]

That on July 9, 1945, the summons in the above-entitled action directed to defendant United States Borax Company, with a copy of the complaint, was served upon W. W. Cahill, President of said corporation, at 510 West Sixth Street, in the City of

Los Angeles, County of Los Angeles, State of California. That so far as affiant has any knowledge no process in said action directed to said corporation has been served upon any other person or at any other time or place.

(Receipt of Service)

S. M. NELSON.

Subscribed and sworn to before me this 23rd day of October, 1945.

[Seal] DOROTHY S. UPDEFRAFF,
Notary Public in and for the County of Los Angeles, State of California. [52]

State of California
Office of the Secretary of State

[Seal]

I, Frank M. Jordan, Secretary of State of the State of California, hereby certify:

That I have compared the annexed transcript with the record on file in my office, of which it purports to be a copy, and that the same is a full, true and correct copy thereof.

In witness whereof, I hereunto set my hand and affix the Great Seal of the State of California this 18th day of October, 1945.

[Seal] FRANK M. JORDAN,
Secretary of State.

By: CHAS. J. HAGERTY,
Deputy.

Filed in the office of the Secretary of State of the State of California, Oct. 4, 1938. Frank M. Jordan, Secretary of State; by: Chas. J. Hagerty.

STATEMENT AND CERTIFICATE OF
UNITED STATES BORAX COMPANY, A
WEST VIRGINIA CORPORATION, OF
CHANGE OF LOCATION OF ITS PRIN-
CIPAL OFFICE AND OF NEW ADDRESS
OF ITS AGENT FOR SERVICE OF
PROCESS

United States Borax Company, a West Virginia corporation, hereby states:

1. That said corporation has heretofore filed in the office of the California Secretary of State a statement of the location of its principal office in said state, and of the name of the person upon whom process directed to said corporation might be served.

2. That said corporation has changed the location and address of its principal office within the State of California, and that the new location and address of its principal office within said state is 510 West Sixth Street, in the City of Los Angeles, County of Los Angeles, State of California.

3. That the person heretofore named as agent of said corporation upon whom process directed to said corporation may be served, has changed his business address and that his name and his complete new business address is C. R. Dudley, 510 West Sixth Street, Los Angeles, California.

4. That United States Borax Company hereby irrevocably consents that such process may be served on its agent herein designated and that in the event the agent so designated, or his successor,

is no longer authorized to act or cannot be found at the address given, service of such process may be made on the Secretary of State of the State of California.

In witness whereof, said corporation has caused its corporate name to be hereunto subscribed and its corporate seal to be impressed hereon this 29th day of September, 1938.

[Seal] UNITED STATES BORAX
COMPANY,

By [signature illegible]
President.

By [signature illegible]
Secretary.

Filed in the office of the Secretary of State of the State of California, Dec. 13, 1943. Frank M. Jordan, Secretary of State.

Secretary of State, Corporation Number 604-A.

Certificate—State of West Virginia

I, Wm. S. O'Brien, Secretary of State of the State of West Virginia, hereby certify that C. R. Dudley, Vice-President of United States Borax Company, a corporation created and organized under the laws of the State of West Virginia, has certified to me under his signature and the corporate seal of said corporation, that, at a meeting of the stockholders of said corporation, regularly held in accordance with the requirements of the law of said State, at the principal office of said corporation, in the City of Los Angeles, State of California, on the

8th day of September, 1943, at which meeting a majority of the issued and outstanding voting stock of such corporation being represented by the holders thereof, in person, by bodies corporate or by proxy and voting for the following resolution, the same was duly and regularly adopted and passed, to wit:

“Whereas, it is deemed to be for the best interests of this corporation that the principal office and place of business of the corporation be located at 510 West 6th Street, Los Angeles, California; and

“Whereas, it is declared in Article Tenth of the Charter of this corporation that the principal office of the corporation be located in the City and County of San Francisco, State of California;

“Now, therefore, be it resolved that the first sentence of the second paragraph of Article Tenth of the Charter of this corporation be amended to read as follows:

“Which said corporation shall have its principal office and place of business at the City of Los Angeles, State of California, and is to expire on the 6th day of December, 1949; and [55]

“Be it further resolved, that the president or vice-president of this corporation is hereby authorized and directed under his signature and the seal of the corporation to certify this resolution and the fact and manner of the adoption hereon to the Secretary of State of West Virginia, and to take such further action as may be necessary and proper to effect the amendment of the Charter of this cor-

poration herein provided in accordance with the laws of the State of West Virginia.”

“Wherefore, I do declare that the principal office or place of business of said corporation shall hereafter be at 510 West 6th Street, Los Angeles, California.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this thirtieth day of September, 1943.

(G.S.) WM. S. O'BRIEN,
Secretary of State.

CERTIFICATE

State of West Virginia

[Seal]

I, Wm. S. O'Brien, Secretary of State of the State of West Virginia, hereby certify that the foregoing is a true and correct copy of the certificate of the change of the principal office and place of business of the United States Borax Company to 510 West 6th Street, Los Angeles, California, as appears from the records of my said office.

Given under my hand and the Great Seal of the said State, at the City of Charleston, this third day of December, 1943.

[Seal] W. S. O'BRIEN,
Secretary of State.

[Endorsed]: Filed Oct. 29, 1945. [57]

[Title of District Court and Cause.]

MOTIONS OF DEFENDANT PACIFIC COAST
BORAX COMPANY TO DISMISS FOR
FAILURE TO STATE A CLAIM ON
WHICH RELIEF MAY BE GRANTED, TO
DISMISS BECAUSE THE ACTION IS
BARRED BY THE STATUTE OF LIMITA-
TIONS, AND TO STRIKE

Defendant Pacific Coast Borax Company hereby
moves the Court:

I.

To dismiss the action as against it on the ground
that the complaint fails to state a claim on which
relief can be granted.

II.

To dismiss the action as against it on the follow-
ing grounds, severally:

1. That the action is barred by the Statute of
Limitations.

2. That the action is barred by the provisions of
Subdivision (1) of Section 338 of the California
Code of Civil Procedure.

3. That the action is barred by the provisions of
Subdivision (4) of Section 338 of the California
Code of Civil Procedure.

4. That the right of action set forth in the com-
plaint did not accrue within three years next before
the commencement of the action but accrued, if at
all, prior to said three years.

5. That the right of action set forth in the complaint did not accrue within three years next before September 14, 1944 but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942 but accrued, if at all, prior to said date. [58]

III.

In the alternative, if the motions to dismiss above referred to are not granted, to strike from the complaint the allegations of each of the paragraphs of the complaint listed below, and severally each and every one of the allegations contained in said paragraphs, on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All of paragraph 2 of the complaint.
2. All of paragraph 26 of the complaint.
3. All of paragraph 27 of the complaint.
4. All of paragraph 28 of the complaint.
5. All of paragraph 29 of the complaint.
6. All of paragraph 30 of the complaint.
7. All of paragraph 31 of the complaint.
8. All of paragraph 34 of the complaint.
9. All of paragraph 35 of the complaint.
10. All of paragraph 36 of the complaint.
11. All of paragraph 37 of the complaint.
12. All of paragraph 38 of the complaint.
13. All of paragraph 39 of the complaint.
14. All of paragraph 40 of the complaint.

15. All of paragraph 41 of the complaint.
16. All of paragraph 42 of the complaint.
17. All of paragraph 44 of the complaint.
18. All of paragraph 45 of the complaint.
19. All of paragraph 46 of the complaint.
20. All of paragraph 49 of the complaint.
21. All of paragraph 50 of the complaint.
22. All of paragraph 51 of the complaint.
23. All of paragraph 52 of the complaint.
24. All of paragraph 53 of the complaint. [59]
25. All of paragraph 54 of the complaint.
26. All of paragraph 55 of the complaint.
27. All of paragraph 56 of the complaint.
28. All of subsection (a) of paragraph 58 of the complaint.
29. All of subsection (c) of paragraph 58 of the complaint.
30. All of subsection (d) of paragraph 58 of the complaint.
31. All of subsection (e) of paragraph 58 of the complaint.
32. All of subsection (g) of paragraph 58 of the complaint.
33. All of subsection (h) of paragraph 58 of the complaint.
34. All of subsection (j) of paragraph 58 of the complaint.
35. All of subsection (k) of paragraph 58 of the complaint.
36. All of subsection (l) of paragraph 58 of the complaint.
37. All of subsection (m) of paragraph 58 of the complaint.

38. All of subsection (n) of paragraph 58 of the complaint.
39. All of subsection (o) of paragraph 58 of the complaint.
40. All of subsection (i) of paragraph 58 of the complaint.
41. All of paragraph 61 of the complaint.
42. All of paragraph 62 of the complaint.
43. All of paragraph 63 of the complaint. [60]
44. All of paragraph 64 of the complaint.
45. All of paragraph 65 of the complaint.
46. All those portions of paragraph 68 of the complaint beginning with the word "various" in line 9 on page 28 and running to the end of said paragraph, with the exception of the word "plaintiff" in line 11.
47. All of paragraph 69 of the complaint.
48. All of paragraph 70 of the complaint.
49. All of paragraph 71 of the complaint.
50. All of paragraph 72 of the complaint, excluding the first three sentences thereof.
51. That portion of paragraph 73 of the complaint appearing on page 33 thereof and reading as follows:

"that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative; who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said pro-

test said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes and therefore alleges that said activities on the part of said government official were done on behalf of said defendants herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease."

52. All of paragraph 77 of the complaint.

53. All of paragraph 78 of the complaint.

54. All of paragraph 79 of the complaint.

55. All of paragraph 80 of the complaint. [61]

56. All of paragraph 81 of the complaint.

Each of the foregoing motions is based on all the pleadings and papers on file herein, including this written motion, and on the accompanying affidavit of Moses Lasky and Exhibits 1 to 5 inclusive, attached to said affidavit, being photostatic copies of certain original records on file in the United States District Court for the District of Nevada, in that certain case entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, Plaintiffs vs. George F. Smith, Postmaster of the United States, in charge of the Post Office at Reno, Nevada." Equity No. E. 75, as follows: "Amended Complaint" filed April 14, 1926, "Affidavit in Support of Motion for Temporary Injunction" executed by George B. Burnham and filed January 15, 1930, a certain document marked in said cause Defendants' Ex. F., a certain "Stipulation" dated January 14,

1930 and filed January 15, 1930, and a certain Post Office Fraud Order No. 3006.

Dated: San Francisco, October 29, 1945.

NEWLIN, HOLLEY,
SANDMEYER & COLEMAN,
/s/ MAURICE E. HARRISON,
/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for defendant
Pacific Coast Borax
Company.

(Admission of service noted.)

[Endorsed]: Filed Oct. 29, 1945. [62]

[Title of District Court and Cause.]

AFFIDAVIT OF MOSES LASKY IN SUP-
PORT OF MOTIONS TO DISMISS FILED
BY UNITED STATES BORAX COMPANY
AND DEFENDANT PACIFIC COAST
BORAX COMPANY

State of California,
City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and
says:

He is one of the attorneys for United States Borax
Company and Pacific Coast Borax Company.

On Monday and Tuesday, September 24 and 25,
1945, he temporally examined, at the office of the

Clerk of the United States District Court for the District of Nevada, the files in that certain case in said court entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, plaintiffs vs. George F. Smith, Postmaster of the United States in charge of the Post Office at Reno, Nevada," being numbered in the files of said court Equity Case No. E-75. There is in said files an original document entitled Amended Complaint, 77 pages in length, verified by George B. Burnham, president of the plaintiff in the present case. Said amended complaint was filed in said suit on April 14, 1926. Affiant caused said amended complaint to be photostated. Attached hereto as Exhibit 1 is a true, complete and exact photostatic copy of said original amended complaint.

There is also on file in said equity suit No. E-75 a certain document identified as Defendants' Ex. "F", being a printed letter over the signature of G. B. Burnham dated April 1926 and addressed to the stockholders of Burnham Chemical Company. Affiant caused said defendants' Exhibit F to be photostated, and attached hereto marked Exhibit 2 is a full, complete and exact photostatic copy of said defendants' Ex. "F".

There is also on file in said Equity Case No. E-75 a certain original document entitled "Affidavit in Support of Motion for Temporary Injunction," being an affidavit executed by said George B. [63] Burnham on January 14, 1930 and filed in said Equity Case No. E-75 on January 15, 1930. Affiant caused said original affidavit of George B. Burnham

to be photostated, and attached hereto marked Exhibit 3 is a true, complete and exact photostatic copy of said affidavit.

As appears by the records of said Clerk of the United States District Court for the District of Nevada, a hearing was held before the Honorable Frank H. Norcross, District Judge, on January 15, 16 and 17, 1930 upon plaintiffs' motion for a temporary injunction, and at said hearing on January 15, 1930, the above mentioned affidavit of George B. Burnham was offered by counsel for Burnham Chemical Company and George B. Burnham and was received, and plaintiffs' application for temporary injunction was predicated also upon said amended complaint, all of which appears from Exhibit 4 attached hereto and from the minutes of said court of Wednesday, January 15, 1930 as the same appear at page 636 of Volume 4 of the Equity Journal, which affiant personally read. Said minutes read as follows:

(Caption and number of the case omitted here.)

“This being the time heretofore fixed for hearing on plaintiffs' petition for an injunction herein and upon defendant's motion to strike from the complaint, and the same coming on regularly this day, Messrs. B. D. Townsend, Esq. and E. F. Lunsford, Esq. appeared for and on behalf of the plaintiff, Francis J. Heney, Esq. not being present; and H. H. Atkinson, United States Attorney, and his assistants, G. A. Whitely and G. A. Montrose, appeared for defendant. Reporter called upon usual terms.

Mr. Townsend files his stipulation that all papers and files in this case up to the present time be considered in this hearing; also files affidavit of George B. Burnham in support of motion for a temporary injunction. Upon stipulation of counsel it is agreed that the hearing herein had at this time be upon the motion for a temporary injunction and upon defendant's motion to strike from the bill of complaint. Argument. Mr. Townsend makes his opening argument, and at 3:47 o'clock p.m. recess was declared until tomorrow morning at 10 o'clock."

There is also on file in said equity suit No. E-75 a certain document entitled "Stipulation" dated January 14, 1930 and filed January 15, 1930. Affiant caused said stipulation to be photostated, and attached hereto marked Exhibit 4 is a true complete and exact photostatic copy of said stipulation.

The allegation of the complaint in the instant case in paragraph 74 on page 35 that during the month of February 1930 the United States District Court for the District of Nevada granted the prayer of the plaintiff and enjoined the postal authorities and the Postmaster at Reno, Nevada from proceeding under the Post Office fraud order is misleading, as appears from the records in said case, Equity No. E-75. The hearing held January 1930 in said case as appears from said minutes, was a hearing on a motion for a temporary injunction. The only injunction ever issued in said case was a temporary injunction, which was issued pursuant to an order dated February 3, 1930, and entitled "Order Granting Temporary Injunction and Setting Case for Trial." The said order, which appears as a written

paper and also in the minutes of said Court at page 652 of Volume 4 of the Equity Journal, under date of February 3, 1930, also set the cause for trial on its merits on April 15, 1930. It appears from the records that the case was never tried, and that under date of October 24, 1935, in Volume 5 of the Equity Journal, at page 776, appears the following order:

(Caption and number omitted here.)

“The United States Attorney consenting thereto, it is ordered that this case be, and the same hereby is dismissed for lack of prosecution.”

It is thus a matter of record that on October 24, 1935 said suit of Burnham Chemical Company, et al vs. Smith, etc., was dismissed and that the Post Office fraud order which was issued against the Burnham Chemical Company in 1925 is and has been ever since in full force and effect. [65]

There also is in the files in said equity suit No. E-75 a copy of the Post Office fraud order, the enforcement of which plaintiff in said action sought to enjoin. Affiant caused said fraud order to be photostated, and attached hereto marked Exhibit 5 is a true, complete and exact photostatic copy of said Post Office fraud order.

MOSES LASKY.

Subscribed and sworn to before me this 27th day of October, 1945.

[Seal] EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California. [66]

EXHIBIT 2

Defendant's Ex. "F"

Officers: B. G. Burnham, President; C. W. Whitney, Vice-President; E. D. Burnham, Secretary Treasurer. Natural Resources: 8,000,000 Tons Borax, 6,000,000 Tons Potassium Chloride, 30,000,000 Tons Sodium Carbonate, 30,000,000 Tons Sodium Sulphate, 60,000,000 Tons Sodium Chloride. Works at Westend, San Bernardino County, California.

Burnham Chemical Company, 212 Nevada State Life Building, Reno, Nevada.

Important Information—Legal Proceedings

April 1926.

To the Stockholders of the
Burnham Chemical Company:

In our suit to enjoin the enforcement of the fraud order, the Post Office Department filed an answer, by which, in effect, they refused to admit or deny nearly all of the facts stated in our original complaint; and took the position that the Court cannot consider any of the facts, excepting such as the Post Office Inspectors disclosed to the Solicitor during the proceedings in the Post Office Department.

By their defense, the Post Office Department seek to evade the true facts in the case. The unfairness of this attempted defense is apparent, especially in

view of the fact that during the proceedings before the Solicitor, the Post Office Inspectors and attorneys concealed nearly all of the facts and evidence in their possession, and which were favorable to the Burnham Chemical Company. For example: The U. S. Bureau of Mines investigated the processes, plant and development of the Burnham Chemical Company, at the request of the Post Office Department and expressly for the information of the Postmaster-General. They made a report of the results of this investigation. It was favorable to the Burnham Chemical Company. But this report was concealed; even the fact that the investigation had been made was concealed; and false statements and arguments were substituted, by which the Solicitor and the Postmaster-General were deceived as to the true facts.

Having concealed the truth from the Solicitor and the Postmaster-General, now, by their answer, the Post Office Department seek to conceal the truth from the Court. Thus, the issuance of the fraud order was obtained by fraud and deception; and the perpetrators of the fraud now seek to defeat justice by imposing upon the Court the same fraud [67] and deception which they imposed upon the Solicitor and the Postmaster-General.

To meet this remarkable defense, our attorneys concluded to file an amended complaint, setting forth in detail the fraudulent concealments, deceptions and misrepresentations practiced by the Post

Office Department itself, during the proceedings before the Solicitor; asking the Court to compel the Post Office Department to disclose the true facts and asking the Court to relieve the Burnham Chemical Company from the unjust consequences of these fraudulent concealments, deceptions and misrepresentations.

The amended complaint was prepared and filed April 14th. The Post Office Department must now answer this amended complaint, which reverses the issue, and charges the Post Office Department itself with fraud. The preparation of this amended complaint involved a large amount of work and consumed more than four months' time. However, the work was pushed as rapidly as possible, as you will realize when you read the amended complaint.

A few of the stockholders have asked us for an explanation of the delay in our legal proceedings; and doubtless all of you have been interested to know. Our attorneys advised us not to discuss the subject until the amended complaint had been actually filed, and then to mail to each of the stockholders an exact duplicate of the amended complaint as a complete answer to all inquiries.

Pursuant to this advice, a copy of the amended complaint will be mailed to each of the stockholders within the next three days, and this letter is addressed to you to prepare you for the amended complaint which is to come.

The first nine pages of the amended complaint are much the same as the original complaint, which was filed October 1, 1925. But you will find a great deal of new and interesting information in the pages which follow. [68]

It is your duty, not only to your company, but yourself, to read this amended complaint.

Be sure to read it thoroughly and completely, and then ask yourself the following question:

Who has been guilty of fraud, the Burnham Chemical Company or the Post Office Department?

BURNHAM CHEMICAL
COMPANY,

By G. B. BURNHAM,
President.

GBB/SA

(Here follows Exhibit 1, which is identical with Defendants' Exhibit C introduced at the trial of the special issues.)

(Here follows Exhibit 3, which is identical with Defendants' Exhibit P introduced at the trial of the special issues.) [69]

EXHIBIT 4

In the District Court of the United States
for the District of Nevada
No.

BURNHAM CHEMICAL COMPANY, GEORGE
B. BURNHAM AND V. E. SCOTT,
Plaintiffs,

vs.

GEORGE F. SMITH, POSTMASTER of the
United States, in charge of the Post Office at
Reno, Nevada,
Defendant.

STIPULATION

It is hereby stipulated by and between the parties
of the above-entitled proceeding:

I.

That the papers and files upon which the motion
for temporary injunction shall be deemed to have
been made, and upon which such motion shall be
heard and determined, shall include all papers,
records and files in such action down to the time
that such motion shall be heard, and shall not be
limited to the papers, records and files existing at
the time such motion was filed: supplemental motion
being hereby expressly waived.

II.

The affidavit of G. B. Burnham, which shall be
filed contemporaneously herewith, and a copy of

which has been this day handed to undersigned United States Attorney, shall also be included in the papers, records and files to be used and considered upon such motion. Said affidavit is offered to explain delay in calling present motion for hearing.

Dated: January 14, 1930. [70]

FRANCIS J. HENEY,

B. D. TOWNSEND,

E. F. LUNSFORD,

Attorneys for Plaintiffs.

H. W. ATIKINSON.

Filed Jan. 15, 1930.

C. O. PATTERSON,

Clerk.

EXHIBIT 5

(Copy)

Deft. Ex. "A"

Order No. (Illegible)

Post Office Department, Washington

June 20, 1925

It having been made to appear to the Postmaster General, upon evidence satisfactory to him, that the Burnham Chemical Company, and G. B. Burnham, President, at Reno Nevada, are engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretenses, representations, and promises, in violation of the act of Congress entitled "An act to amend certain

sections of the Revised Statutes relating to lotteries, and for other purposes," approved September 19, 1890, said evidence being more fully described in the memorandum of the Solicitor for the Post Office Department of the date of June 15, 1925, and by authority vested in the Postmaster General by said act, and by the act of Congress entitled "An act for the suppression of lottery traffic through international and interstate commerce and the postal service, subject to the jurisdiction and laws of the United States," approved March 2, 1895, the Postmaster General hereby forbids you to pay any Postal Money Order drawn to the order of said concern & party and you are hereby directed to inform the remitter of any such postal money order that payment thereof has been forbidden, and that the amount thereof will be returned upon the presentation of the original order or a duplicate thereof applied for and obtained under the regulations of the Department.

And you are hereby instructed to return all letters, whether registered or not, and other mail matter which shall arrive at your office directed to the said concern & party to the postmasters at the offices at which they were originally mailed, to be delivered to the senders thereof, with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped upon the outside of such letters or matter. Where there is nothing to indicate who are the senders of letters not registered or other matter, you are directed to send such letters and matter to the Division of Dead

Letters with the words "Fraudulent: Mail to this address returned by order of Postmaster General" plainly written or stamped thereon, to be disposed of as other dead matter under the laws and regulations applicable thereto.

/s/ W. IRVING GLOVER,

Acting Postmaster General.

Case No. (Illegible) To the Postmaster, Reno, Nevada.

S. C. Receipt of a copy of the within is hereby admitted this 29th day of Oct., 1945.

STERLING CARR,

Attorney for Pltf.

[Endorsed]: Filed Oct. 29, 194⁵~~7~~. [73]

[Title of District Court and Cause.]

NOTICE OF MOTIONS OF DEFENDANT
BORAX CONSOLIDATED, LTD. to DIS-
MISS FOR FAILURE TO STATE A CLAIM
ON WHICH RELIEF MAY BE GRANTED,
TO DISMISS BECAUSE THE ACTION IS
BARRED BY THE STATUTE OF LIMITA-
TIONS, AND TO STRIKE

To Burnham Chemical Company, the plaintiff, and
to Sterling Carr, Esq., its attorney:

Please Take Notice, hereby given, that on Tues-
day, December 4, 1945, at the hour of 10 o'clock
a.m., or as soon thereafter as counsel can be heard,
in the courtroom of the above-entitled court, before

the Honorable Louis E. Goodman, District Judge, in the Post Office Building, in the City and County of San Francisco, State of California, defendant Borax Consolidated, Ltd. will move the court as follows:

I.

To Dismiss the action as against it on the ground that the complaint fails to state a claim on which relief can be granted.

II.

To Dismiss the action as against it on the following grounds, severally:

1. That the action is barred by the Statute of Limitations.

2. That the action is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.

3. That the action is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.

4. That the right of action set forth in the complaint did not accrue within three years next before the [74] commencement of the action but accrued, if at all, prior to said three years.

5. That the right of action set forth in the complaint did not accrue within three years next before September 14, 1944, but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942, but accrued, if at all, prior to said date.

III.

In the alternative, if the motions to dismiss above referred to are not granted, To Strike from the complaint the allegations of each of the paragraphs of the complaint listed below, and severally each and every one of the allegations contained in said paragraphs, on the ground that they are, and each of them is, redundant, immaterial and impertinent matter, to wit:

1. All of paragraph 2 of the complaint.
2. All of paragraph 26 of the complaint.
3. All of paragraph 27 of the complaint.
4. All of paragraph 28 of the complaint.
5. All of paragraph 29 of the complaint.
6. All of paragraph 30 of the complaint.
7. All of paragraph 31 of the complaint.
8. All of paragraph 34 of the complaint.
9. All of paragraph 35 of the complaint.
10. All of paragraph 36 of the complaint.
11. All of paragraph 37 of the complaint.
12. All of paragraph 38 of the complaint.
13. All of paragraph 39 of the complaint.
14. All of paragraph 40 of the complaint. [75]
15. All of paragraph 41 of the complaint.
16. All of paragraph 42 of the complaint.
17. All of paragraph 44 of the complaint.
18. All of paragraph 45 of the complaint.
19. All of paragraph 46 of the complaint.
20. All of paragraph 49 of the complaint.
21. All of paragraph 50 of the complaint.

22. All of paragraph 51 of the complaint.
23. All of paragraph 52 of the complaint.
24. All of paragraph 53 of the complaint.
25. All of paragraph 54 of the complaint.
26. All of paragraph 55 of the complaint.
27. All of paragraph 56 of the complaint.
28. All of subsection (a) of paragraph 58 of the complaint.
29. All of subsection (c) of paragraph 58 of the complaint.
30. All of subsection (d) of paragraph 58 of the complaint.
31. All of subsection (e) of paragraph 58 of the complaint.
32. All of subsection (g) of paragraph 58 of the complaint.
33. All of subsection (h) of paragraph 58 of the complaint.
34. All of subsection (j) of paragraph 58 of the complaint.
35. All of subsection (k) of paragraph 58 of the complaint.
36. All of subsection (l) of paragraph 58 of the complaint.
37. All of subsection (m) of paragraph 58 of the complaint. [76]
38. All of subsection (n) of paragraph 58 of the complaint.
39. All of subsection (o) of paragraph 58 of the complaint.
40. All of subsection (i) of paragraph 58 of the complaint.

41. All of paragraph 61 of the complaint.

42. All of paragraph 62 of the complaint.

43. All of paragraph 63 of the complaint.

44. All of paragraph 64 of the complaint.

45. All of paragraph 65 of the complaint.

46. All those portions of paragraph 68 of the complaint beginning with the word "various" in line 9 on page 28 and running to the end of said paragraph, with the exception of the word "plaintiff" in line 11.

47. All of paragraph 69 of the complaint.

48. All of paragraph 70 of the complaint.

49. All of paragraph 71 of the complaint.

50. All of paragraph 72 of the complaint, excluding the first three sentences thereof.

51. That portion of paragraph 73 of the complaint appearing on page 33 thereof and reading as follows:

"that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative who formerly had been, prior to his appointment to such position, the Chicago Manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company; plaintiff is informed and believes and therefore alleges that said activities on the part of said [77] government official were done on behalf of said defendants

herein and in furtherance of said combination and conspiracy and for the purpose of hindering and preventing, if possible, the carrying on of plaintiff's operations under said lease."

52. All of paragraph 77 of the complaint.

53. All of paragraph 78 of the complaint.

54. All of paragraph 79 of the complaint.

55. All of paragraph 80 of the complaint.

56. All of paragraph 81 of the complaint.

Each of the foregoing motions is and will be based on all the pleadings and papers on file herein, including this written notice of motion, and on the affidavit of Moses Lasky executed October 27, 1945 and filed herein on October 29, 1945 in support of Motions to Dismiss of United States Borax Company and Pacific Coast Borax Company, hereby adopted in support of the instant motions, and upon Exhibits 1 to 5 inclusive, attached to said affidavit, being photostatic copies of certain original records on file in the United States District Court for the District of Nevada, in that certain case entitled "Burnham Chemical Company, George B. Burnham and V. E. Scott, Plaintiffs, vs. George F. Smith, Postmaster of the United States, in charge of the Post Office at Reno, Nevada," Equity No. E 75, as follows: "Amended Complaint" filed April 14, 1926, "Affidavit in Support of Motion for Temporary Injunction" executed by George B. Burnham and filed January 15, 1930, a certain document marked in said cause Defendants' Ex. F., a certain

“Stipulation” dated January 14, 1930 and filed January 15, 1930, and a certain Post Office Fraud Order No. 3006. [78]

Dated: San Francisco, November 24, 1945.

NEWLIN, HOLLEY, SAND-
MEYER & COLEMAN,
MAURICE E. HARRISON,
MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for defendant
Borax Consolidated, Ltd.

Points and Authorities in Support
of Foregoing Motions

Defendant Borax Consolidated, Ltd. hereby adopts the “Memorandum in Support of Motions of United States Borax Company and Defendant Pacific Coast Borax Company to Dismiss and to Strike” filed herein on November 2, 1945.

(Admission of service noted.)

[Endorsed]: Filed Nov. 23, 1945.

[Title of District Court and Cause.]

AMERICAN POTASH & CHEMICAL CORPOR-
ATION'S AMENDED MOTIONS TO DIS-
MISS THE ACTION AND TO STRIKE
PARTS OF THE COMPLAINT

Now comes the defendant, American Potash & Chemical Corporation, and without admitting any

of the allegations of the complaint, submits the following motions:

I.

Motion to Dismiss the Complaint

Defendant, American Potash & Chemical Corporation, moves to dismiss the complaint on the ground that the complaint fails to state a claim on which relief can be granted.

II.

Motion to Dismiss the Complaint

Defendant, American Potash & Chemical Corporation moves to dismiss the complaint on the following grounds, severally:

1. That the action is barred by the Statute of Limitations.
2. That the action is barred by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure.
3. That the action is barred by the provisions of Subdivision (4) of Section 338 of the California Code of Civil Procedure.
4. That the right of action set forth in the complaint did not accrue within three years next before the commencement of the action but accrued, if at all, prior to said three years.
5. That the right of action set forth in the complaint did not accrue within three years next before [80] September 14, 1944, but accrued, if at all, prior to said date.

6. That the right of action set forth in the complaint did not accrue within three years next before October 10, 1942, but accrued, if at all, prior to said date.

III.

Motion to Strike Parts of Complaint

Defendant, American Potash & Chemical Corporation, in the alternative to the motions numbered I and II hereof, moves to strike the following portions of the complaint for the reason that the same are immaterial, redundant, impertinent and scandalous, to-wit:

(1) The last sentence in paragraph 7 on page 4 of the complaint;

(2) All of that portion of paragraph 44 on page 15 of the complaint following the word "California" in the third from the last line of said paragraph;

(3) All of paragraph 45 on pages 15 and 16 of the complaint;

(4) All of paragraph 46 on page 16 of the complaint;

(5) All of that portion of paragraph 48 on pages 16 and 17 of the complaint following the figures "1926" in the seventh line of said paragraph;

(6) All of that portion of paragraph 51 on page 18 of the complaint following the words "Western Borax Company" which are the first three words in the twelfth line from the top of page 18;

(7) All of paragraph 52 on page 18 and 19 of the complaint; [81]

(8) All of paragraph 53 on page 19 of the complaint;

(9) All of that portion of paragraph 57 on page 21 of the complaint as follows:

(a) Beginning with the last word in the third line of said paragraph down to and including the seventh word in the fifth line of said paragraph which reads "and continuing thereafter up to and including the date of filing of this complaint, have been and now are".

(b) Beginning with the fourth word in the seventh line of said paragraph and ending with the sixth word in said line which reads "have in fact".

(c) The seventh word in the eleventh line of said paragraph, being the word "have."

(d) The third word in the twelfth line and the eighth word in the twelfth line, both being the word "have".

(10) The word "have", being the second word in the fourth line, paragraph 58, page 21, of the complaint;

(11) All of paragraph 60 on page 24 of the complaint;

(12) All of paragraph 61 on page 24 and 25 of the complaint;

(13) All of paragraph 62 on page 25 and 26 of the complaint;

(14) All of paragraph 63 on page 26 and 27 of the complaint;

(15) All of paragraph 64 on page 27 of the complaint; [82]

(16) All of paragraph 65 on page 27 of the complaint;

(17) All of paragraph 68 on page 28 of the complaint;

(18) All of paragraph 69 on page 28 and 29 of the complaint;

(19) All of paragraph 70 on page 29 of the complaint;

(20) All of paragraph 77 on page 36 of the complaint;

(21) All of paragraph 78 on page 37 and 38 of the complaint;

(22) All of paragraph 79 on page 39 of the complaint;

(23) All of paragraph 80 on page 40 of the complaint;

Each of said motions is based on all pleadings and papers on file herein, including this written motion, and on the affidavit of Moses Lasky and Exhibits One to Five inclusive, attached to said affidavit, said affidavit having been filed in this cause in support of the Motion to Dismiss and to Strike of the defendant Pacific Coast Borax Company.

OLIVER & DONNALLY,
WILLIAM J. FROELICH,
CHARLES A. BEARDSLEY,
PHILIP M. AITKEN.

Attorneys for Defendant,

American Potash & Chemical Corporation. [83]

[Affidavit of service by mail attached.]

[Endorsed]: Filed Nov. 27, 1945. [84]

[Title of District Court and Cause.]

AMENDMENT TO COMPLAINT

Now comes plaintiff above named and, pursuant to Rule 15, Section (A), files this its amendment to its complaint on file herein.

I.

Add to said complaint a new paragraph No. 81-A and to follow immediately paragraph 81 of said complaint, viz:

That plaintiff had no knowledge of said conspiracies and combinations herein set forth or the intent or purposes of said defendants in the performance of the acts herein in this complaint set forth until on or about the commencement of an action by the United States versus certain defendants herein and filed in the United States District Court for the Northern District of California, Southern Division, on September 14, 1944 and numbered therein 23690-G; that likewise plaintiff had no knowledge of said 1929 agreement referred to hereinabove and described in paragraphs 62 to 68, inclusive, or of the said prior, or said subsequent agreements made pursuant to said 1929 agreement, until the said time of the filing of said action by said United States against said defendants herein on or about September 14, 1944; that while plaintiff did have knowledge of certain acts, things and proceedings taken, had and engaged in by said defendants, or some of them, and as herein set forth, it had no knowledge, information or belief, or any opportunity to secure such knowledge or information, of the fact of the

fraudulent and illegal formation [85] of said 1929 conspiracy or the said prior agreements which led thereto, or of said subsequent agreements, and was without knowledge or means of knowledge that all of said things, acts and proceedings of defendants, or some of them, as herein in this complaint set forth were so performed and carried out in fraud of plaintiff and pursuant to said 1929 agreement, or said prior or said subsequent agreements, until subsequent to the filing by said United States of said action against said defendants, or some of them, on September 14, 1944; that all of said acts and things of defendants, and herein set forth, were done, carried on and performed pursuant to said fraudulent conspiracies and combinations, and as a part thereof, and in fraud of plaintiff and others and to destroy the business and competition of plaintiff; that the formation of said conspiracies and combination and the doing, performance and carrying on by defendants of the said things, acts and plans herein set forth were so done, performed or carried on pursuant to said conspiracies and combinations and were fraudulently concealed from plaintiff and others similary situated in order to prevent plaintiff, or said others, from bringing actions against defendants, or some of them, under the Anti-Trust laws of the United States; that plaintiff had no knowledge or information or means of knowledge or information of the formation of said conspiracies, combinations or agreements until on or about the commencement by said United States of said action against said defendants on September 14, 1944. [86]

II.

Plaintiff further amends said complaint by adding thereto the following paragraph to be known as 81-B and to follow immediately after said paragraph 81-A.

That said defendants, or certain of them, the exact ones of which being to plaintiff unknown at this time, fraudulently caused their books and records during various times herein set forth to be changed, altered, destroyed or substituted in an endeavor to prevent, and with the intent of preventing, the true facts, situations and purposes of defendants in the carrying on of said conspiracies and combinations herein set forth, from being known or discovered by plaintiff, or other parties, and in order to give a false, fraudulent and incorrect statement of their, or some of their, affairs, conditions, activities and purposes; that plaintiff had no knowledge or information or means of knowledge or information of the facts herein in this paragraph 81-A alleged until subsequent to the commencement of said action of the United States filed September 14, 1944 and hereinabove described.

STERLING CARR,

Attorney for Plaintiff.

(Verification)

[Endorsed]: Filed Dec. 4, 1945. [87]

[Title of District Court and Cause.]

STIPULATIONS RE MOTIONS
OF DEFENDANTS

Whereas, on October 29, 1945, defendant United States Borax Company filed herein its Motion to Quash Service of Summons and to Dismiss for Improper Venue and For Lack of Jurisdiction Over the Person of the Defendant, to Dismiss for Failure to State a Claim Upon Which Relief May Be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations, and to Strike, and

Whereas, on the same day defendant Pacific Coast Borax Company filed herein its Motion to Dismiss for Failure to State a Claim On Which Relief May Be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations and to Strike, and

Whereas, on November 23, 1945, defendant Borax Consolidated, Ltd. filed herein its Motion to Dismiss for Failure to State a Claim on Which Relief May Be Granted, to Dismiss Because the Action is Barred by the Statute of Limitations, and to Strike, and

Whereas, on November 27, 1945, defendant American Potash & Chemical Corporation filed herein its Amended Motion to Dismiss the Action and to Strike Parts of the Complaint, and

Whereas, on November 29, 1945, plaintiff filed herein an Amendment to the Complaint, by which it added two paragraphs to its original complaint,

It Is Hereby Stipulated by and between the parties hereto that each of the above mentioned motions [88] may be deemed to be directed in all respects to the complaint as amended.

Dated: December 4, 1945.

STERLING CARR,
Attorney for Plaintiff.

NEWLIN, HOLLEY,
SANDMEYER & COLEMAN,
MAURICE E. HARRISON,
MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendants United States Borax
Company, Pacific Coast Borax Company and
Borax Consolidated, Ltd.

OLIVER & DONNALLY,
WILLIAM J. FROELICH,
CHARLES A. BEARDSLEY,
PHILIP M. AITKEN,
Attorneys for Defendant
American Potash & Chemi-
cal Corporation

So Ordered,

LOUIS E. GOODMAN,
District Judge.

Dated: December 4, 1945.

[Endorsed]: Filed Dec. 4, 1945. [89]

[Title of District Court and Cause.]

STIPULATION

Whereas, on October 29, 1945, defendants United States Borax Company and Pacific Coast Borax Company, and on November 23, 1945, defendant Borax Consolidated, Ltd. filed herein their motions to dismiss for failure to state a claim upon which relief may be granted and to dismiss because the action is barred by the Statute of Limitations; and on November 27, 1945, defendant American Potash & Chemical Corporation filed herein its amended motion to dismiss the action; and

Whereas, on November 29, 1945, plaintiff filed herein an "Amendment to the Complaint," by which it added two paragraphs to its original complaint, and on December 4, 1945, pursuant to stipulation of the parties, it was ordered by the Court that each of the above-mentioned motions might be deemed to be directed in all respects to the complaint as amended; and

Whereas, thereafter, during the hearing on said motions which occurred on December 4 and 5, 1945, it appeared that the plaintiff took the position that said motions could not and should not be treated or regarded as motions for summary judgment under Rule 56 of the Rules of Civil Procedure, and claimed that it had not so regarded them and for that reason had not proffered affidavits in opposition to the affidavit and evidentiary showing filed in support of said motions, but it further appeared that the defendants took the position that such motions could and should be treated and regarded as,

and are, motions for summary judgment, total and partial, as well as being motions to dismiss directed to the complaint as amended; [90]

Now, Therefore, but without prejudice to the respective contentions of the parties as to the nature of the motions in the absence of this stipulation, It Is Hereby Stipulated by and between the parties as follows:

1. Said motions may and shall be deemed to be not only motions to dismiss but also motions for summary judgment, total and/or partial, under said Rule 56;

2. Within forty days from date of this stipulation plaintiff may file such affidavits as it may desire in opposition to said motions for summary judgment; within twenty days from date of this stipulation the defendants may file in further support of said motions for summary judgment such further affidavits, as and if they desire, and within fifteen days after plaintiff's affidavits are filed, defendants may file affidavits in response to the plaintiff's affidavits, and the plaintiff, within five days after defendants' time for filing their reply affidavits has expired or after said affidavits have been filed or within five days after defendants have advised plaintiff's counsel that they do not intend to file reply affidavits, may apply to the court, on 24 hours' notice to defendants' counsel, for leave to offer oral testimony in opposition to said motions for summary judgment, and defendants shall be free to oppose such application.

3. In the event that both the motions to dismiss and the motions for summary judgment are denied,

this stipulation shall be without prejudice to plaintiff's right to apply for a separate trial of the issue of the Statute of Limitations or any other issue, under Rule 42 of the Rules of Civil Procedure, and it shall be without prejudice to the right of any defendant to oppose such application. [91]

4. The submission of the foregoing motions, heretofore made on December 4, 1945, may be set aside.

Dated January 11, 1946.

STERLING CARR,
Attorney for Plaintiff.

NEWLIN, HOLLEY,
SANDMEYER & COLEMAN,
MAURICE E. HARRISON,
MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for defendants United States Borax
Company, Pacific Coast Borax Company, and
Borax Consolidated, Ltd.

OLIVER & DONNALLY,
WILLIAM J. FROELICH,
CHARLES A. BEARDSLEY,
PHILIP M. ALTKEN,

Attorneys for defendant
American Potash & Chemical
Corporation.

So Ordered: LOUIS E. GOODMAN,
District Judge.

Dated: January 15th, 1946.

[Endorsed]: Filed Jan. 15, 1946. [92]

[Title of District Court and Cause.]

FURTHER AFFIDAVIT OF MOSES LASKY
IN SUPPORT OF DEFENDANTS' MO-
TION TO DISMISS AND FOR A SUM-
MARY JUDGMENT

State of California,

City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and says:

He has in his possession photostatic copies of papers and letters constituting file No. Los Angeles 046681 of the United States Department of the Interior, General Land Office, certified August 2, 1945 under the hand of A. E. Donham, Acting Commissioner of the General Land Office, and the seal of the Department of the Interior General Land Office, at Washington, D. C. as being a "true and literal exemplification of the originals and records on file" in said General Land Office in the custody of said Acting Assistant Commissioner.

Among the photostatic copies in that certified file are copies of two letters, one dated September 21, 1934, and the other dated November 28, 1934, each written by Burnham Chemical Company, signed by G. B. Burnham, President, and addressed to Honorable Harold L. Ickes, Secretary of the Interior, Washington, D. C. The photostatic copies in said certified file are negatives, and affiant has caused positive copies to be made directly from the negatives of said two letters. Attached hereto as

Exhibit A is the positive copy of the said letter dated September 21, 1934, and attached hereto as Exhibit B is the positive copy of said letter dated November 28, 1934. [93]

The passages to which defendants particularly call attention are the following:

In the letter of November 28, 1934:

“There are only three principle producers of borax in the world today, namely the Pacific Coast Borax Company and the American Potash and Chemical Company, both controlled by English capital and known as the ‘Borax Trust’. In fact they may be classed as one producer, since they both operate under English control. The West End Chemical Company at Searles Lake is the third producer. There are no other borax producers, because they have now all been bought out by the Trust.”

In the letter of September 21, 1934:

“In the Summer of 1928 this company, after overcoming many difficulties, succeeded in completing it's borax plant upon it's lease property and produced and sold 1427 tons of refined borax. No sooner had we started production than a most drastic cut in the price of borax occurred. Prior to our production borax sold for about \$50. per ton f.o.b. Searles Lake, California. Immediately upon starting production in June 1928 the price was cut to about \$30. per ton F.O.B. Searles Lake. This was the lowest price in the history of the borax busi-

ness. Soon thereafter it was cut even lower, until finally the price was reduced to \$18. per ton. Our cost of production was \$26. per ton and [94] therefore it was impossible for us to continue to operate and produce borax. The prevailing price of borax has remained at approximately this same low figure of \$18. per ton f.o.b. plant.

“The reason our competitor has been able to maintain this low price is because of his illegal acquisition in 1926 of the most valuable and most economical source of sodium borate in the world. This is a new source of borax and is known as the Kramer borax deposit.

* * *

“Therefore, by illegally acquiring a source of cheap borax supply our competitor, the Pacific Coast Borax Company, have made it impossible for us to produce borax at a profit at present prices.

“It is not fair nor just that the Government should now take steps to cancel our lease upon Searles Lake due to the nonpayment of our rent, or the nonproduction of the minerals thereon when the cause of such default is due to the false and deceitful action of our competitor, whose main object is to get patent to sodium borate lands and to drive out all competition and hold a monopoly of the borax business. Nor it it fair that the Government continue to allow an illegal patent on sodium borate lands to continue to the end that the Borax Trust can obtain continued ownership and thereby drive out of business a government leasee,

such as ourselves, who must pay a royalty on production [95] and who obtains its lands and mineral deposits by legal and lawful methods.

“* * * For six years we have been defending the interests of the People of the United States against the illegal practices of the Borax Trust. We had to carry on our battle with meager funds, whereas, the Borax Trust had unlimited money at its disposal. After the six years of struggle in our fight for the Peoples interest, is it fair to cancel our Searles Lake lease because we have no money left to pay the rent? * * *”

MOSES LASKY,

Subscribed and sworn to before me this 29th day of January, 1946.

[Seal] EUGENE P. JONES,
Notary Public in and for the City and County of
San Francisco, State of California.

(Admission of service noted)

(Here follows Exhibit A—Statement that is identical with Defendant's Ex. U and Exhibit B—Statement that is identical with Defendant's Ex. V.)

[Endorsed]: Filed Jan. 29, 1946. [96]

[Title of District Court and Cause.]

AFFIDAVIT OF J. C. LYNCH IN SUPPORT
OF MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

State of New York,
County of New York—ss.

J. C. Lynch, being first duly sworn, deposes and says:

I am Secretary of Pacific Coast Borax Company and have occupied that position since April 1937. I was Chief Accountant of Pacific Coast Borax Company from August 31, 1918 to December 9, 1941, and have been employed in the Accounting and Sales Department since June 1, 1916. I have knowledge, both personal and from the records of the Company, of the prices which the Company has charged for Borax at all times mentioned in this affidavit.

The following tables give the price per ton charged by Pacific Coast Borax Company for Borax in barrels or bags in carload quantities in the Eastern Territory of the United States from January 1920 to February 1942, together with the dates of changes. The Eastern Territory consists of that portion of the United States east of the Rocky Mountains. Until 1933 almost all Borax sold in the United States was sold in the Eastern Territory. The price of Borax in barrels or bags in the Eastern Territory is the basic quotation for Borax in

the trade. Borax was formerly sold in barrels but has been sold in bags since the early 1920's.

January 12, 1920.....	\$165.00
December 20, 1920.....	135.00
March 7, 1921.....	120.00
May 2, 1921.....	115.00
May 30, 1921.....	110.00
August 15, 1921.....	105.00
May 12, 1924.....	95.00
October 25, 1926.....	80.00
September 19, 1927.....	75.00
June 7, 1928.....	60.00
June 28, 1928.....	50.00
April 19, 1929.....	44.00
November 11, 1929.....	47.00
March 23, 1932.....	36.00
June 17, 1935.....	40.00
June 7, 1937.....	42.00
July 1, 1938.....	43.00
February 6, 1942.....	45.00

Authorized by OPA

Burnham Chemical Company at no time produced Boric Acid. The following table sets forth the price per ton charged by Pacific Coast Borax Company for Boric Acid in barrels or bags in carload quantities in the Eastern Territory from January 1920 to February 1942 with the dates of changes:

January 12, 1920.....	\$285.00
December 13, 1920.....	300.00
January 3, 1921.....	295.00
January 21, 1921.....	305.00
February 21, 1921.....	290.00
March 7, 1921.....	260.00
August 1, 1921.....	265.00
August 15, 1921.....	250.00
February 20, 1922.....	230.00
June 7, 1923.....	200.00
September 10, 1923.....	190.00

May 12, 1924.....	170.00
October 25, 1926.....	160.00
June 7, 1928.....	140.00
January 14, 1929.....	110.00
November 11, 1929.....	120.00
March 23, 1932.....	80.00
June 17, 1935.....	95.00
July 1, 1938.....	96.00
February 6, 1942.....	99.00 Approved OPA

The changes in the price of Borax and Boric Acid in the Eastern Territory in the years above referred to were reported at substantially the times when such changes took place in the "Oil Paint, and Drug Reporter", which is and was, at all the times mentioned, the generally recognized [98] trade journal in the entire chemical industry.

J. C. LYNCH.

Subscribed and sworn to before me this 24th day of January 1946.

[Seal] GEORGE E. GABEL,
Notary Public, Kgs. Co. No. 650 Reg. No. 306-G-7.

Cert. filed in NYCo. No. 479 Reg's No. 394-G-7.
Commission expires March 30, 1947.

(Receipt of Service.)

[Endorsed]: Filed Jan. 29, 1946. [99]

[Title of District Court and Cause.]

AFFIDAVIT OF F. M. JENIFER IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS
AND FOR A SUMMARY JUDGMENT

State of California,
County of Los Angeles—ss.

F. M. Jenifer, being first duly sworn, deposes and says:

I am the President of the defendant Pacific Coast Borax Company and have occupied that position since 1937. I have been in the employ of Pacific Coast Borax Company since 1927. I became a Vice President of Pacific Coast Borax Company on or about July, 1929. Continuously from January 1925 to January 1937, Mr. R. C. Baker was President of Pacific Coast Borax Company. Mr. R. C. Baker died in January 1937. Mr. John Ryan was the President and General Manager of Pacific Coast Borax Company for many years prior to January 1925. Mr. John Ryan died many years ago. Mr. C. B. Zabriskie was Vice President and General Manager of Pacific Coast Borax Company from January 1, 1925, until August 1, 1933, at which time he resigned. Mr. Zabriskie died in February 1936.

At all times from January 1, 1929, to 1933 the executive control and management of Pacific Coast Borax Company was in the hands of Mr. R. C.

Baker and Mr. C. B. Zabriskie, both of whom are dead.

F. M. JENIFER.

Subscribed and sworn to before me this 24th day of January, 1946.

[Seal]

DOROTHY S. UPDEGRAFF,

Notary Public in and for said
County and State.

(Admission of Service noted.)

[Endorsed]: Filed Jan. 29, 1946. [100]

[Title of District Court and Cause.]

AFFIDAVIT OF PHILIP M. AITKEN IN SUP-
PORT OF AMENDED MOTIONS TO DIS-
MISS FILED BY AMERICAN POTASH &
CHEMICAL CORPORATION AND MO-
TION FOR SUMMARY JUDGMENT.

State of Nebraska,
Lancaster County—ss.

Philip M. Aitken, being first duly sworn, deposes and says: That he is one of the attorneys for the American Potash & Chemical Corporation,

1. That under date of January 12, 1929, the Burnham Chemical Company, by G. B. Burnham, its president, caused to be prepared and delivered to its stockholders, on the stationery of the said Burn-

ham Chemical Company, a letter which stated, among other things, the following:

“Some very important developments in the borax market have been taking place in recent months which have vital significance, in spite of the fact that the apparent motives back of them are being carefully camouflaged. For the past 100 years, in fact during its entire history, the price of borax has never been below \$75.00 per ton delivered. It is rather a peculiar coincidence that last summer just at the time we were getting ready to produce and put our product on the market, the price dropped to \$50.00 per ton delivered. Taking into consideration the fact that the freight charge is fixed, this means cutting the price of borax at the plant almost in half. It means that we can not make any profit on our borax at this early stage of development. We will be doing well to break even on our operating expense.”

The said letter further stated:

“It has been urged by some who are familiar with the situation that in selling borax at \$50.00 per ton our competitor is selling below actual cost of production, if correctly computed: and that this remarkable cut in the price of borax is nothing but a price war to destroy competition, and particularly the competition of young competitors who are struggling to become established. This matter has been under consideration for some time, and for obvious reasons,

the subject was kept confidential while it was under investigation. That is the reason why this price war has not been mentioned to you until the present time; and, for the same general reason further discussion of it will not be indulged in at this time, except to say that if our competitor has been selling borax for less than cost, it is believed that this fact will increase the wrongs imposed upon us, and therefore will increase the legal remedies available to us."

That attached hereto as Exhibit 1 is a true, complete and exact photostatic copy of the entire letter dated the said January 12, 1929.

2. That under date of March 25, 1929, the Burnham Chemical Company, by G. B. Burnham, its president, W. A. DeWitt, its vice president and C. W. Whitney, its secretary and treasurer, caused to be prepared and delivered to certain of its stockholders a letter which stated, among other things, the following:

"But just as we went into production came the slash in the price of borax. The price dropped to the lowest level in the history of borax production. A drop of more than 50 per cent in the price of borax at this plant. The market became demoralized, and today there is almost no such thing as a definite borax price. There are as many prices as there are purchasers. We believe no one is really making a

profit and for this reason we expect conditions soon to change to normal, but the fight is still on. Your company, an infant in the industry without definitely established markets, without surplus or reserve, was hit the hardest. The [102] solid ground was taken out from under our feet. Our funds were soon exhausted and tied up in finished product. It is hard to move borax fast under existing conditions without great sacrifices.”

The letter further stated:

“Let us take stock of our resources. What have we? On close checking we believe that we have quite a lot. True enough not much to put on the market for a quick sale, under the conditions, but a big thing if properly developed. Of course, the raw material is there—no one doubts that. Our processes are sound and economical—that has been proven to the dissatisfaction and disappointment of our adversaries. Our borax plant is complete and in splendid condition. Our organization is capable, progressive, loyal and energetic. Our processes, which we believe to be the most valuable on Searles Lake, are legally protected by United States Letters of Patents. Our development work for the recovery of salts other than borax is progressing rapidly and satisfactorily. What is wrong then? Nothing fundamentally, except that some sinister forces apparently are trying

to rob us of what is rightfully ours. They know our weak point (lack of surplus and reserve) and they are trying to take advantage of it. Well, what is your management to do about such things? There is no way that we can see but fight for the protection of our rights and interests.”

Attached hereto as Exhibit 2 is a true, complete and exact photostatic copy of the entire letter dated the said March 25, 1929.

3. That during the month of March, 1930, the Burnham Chemical Company caused to be published and delivered to its stockholders Volume 1, No. 17, of the Burnham Chemical Company's paper entitled “Burnham Crystals”. That on page one of said publication under the heading “Plans For Future Production” appeared the following statement:

“Our two main competitors in borax, one at Searles Lake, and the other at Kramer, California, make about 90 per cent of the [103] world's borax. These two companies together completely control the borax price.”

That the aforesaid statement refers to the American Potash & Chemical Company, whose plant is located at Searles Lake, and the Pacific Coast Borax Company, one of whose mines is located at Kramer, California.

Attached hereto as Exhibit 3 is a true, complete

and exact photostatic copy of the issue of "Burnham Crystals" Volume I, No. 17, dated March, 1930.

PHILIP M. AITKEN.

Subscribed and sworn to before me this 4th day of February, 1946.

[Seal] MARY M. MULGRUE,

Notary Public in and for Lancaster County, State of Nebraska.

My commission expires the 30th day of October, 1947.

(Here follows Exhibit 1, identical with Defendants' Ex. M; Exhibit 2, identical with Defendants' Ex. N; Exhibit 3, identical with Defendants' Ex. AF.)

[Endorsed]: Filed February 7, 1946 [104]

[Title of District Court and Cause]

AFFIDAVIT OF GEORGE B. BURNHAM IN
BEHALF OF PLAINTIFF AND IN REPLY
TO AFFIDAVITS FILED BY DEFEND-
ANTS IN SUPPORT OF THEIR MOTIONS
FOR SUMMARY JUDGMENT AND TO
DISMISS AND TO STRIKE OUT

United States of America,
Northern District of California,
City and County of San Francisco—ss.

George B. Burnham, being first duly sworn, deposes and says:

That he is now and at all of the times herein set

forth has been President of Burnham Chemical Company, the plaintiff above named;

That he has read the affidavits of Moses E. Lasky filed herein and to which is attached a photostatic copy of the complaint of Burnham Chemical Company, et al, vs. George F. Smith, Postmaster of the United States in charge of the Post Office at Reno, Nevada, together with a photostatic copy of the Affidavit filed by affiant in said proceeding and together with certain other documents referred to in said affidavit of Moses Lasky; that said complaint in said action was filed on or about the 9th day of April, 1926; that the said affidavit of affiant was filed in said action on or about the 14th day of January, 1930; that it will be noted in said affidavit, paragraph one thereof, that affiant refers specifically to certain paragraphs of said complaint which he knew to be true of his own knowledge, but in this respect made no affirmations as to certain other paragraphs of said complaint, to-wit: Particularly subdivision "k" and all other subdivisions, except (c), (d), (e), (f), (g), (h) and (j) of Paragraph VIII; also, none of the allegations of said Paragraph VIII made upon information or belief was affirmed or confirmed [105] by affiant in said affidavit; also Paragraph IX, entitled "Defamatory Propaganda by Borax Trust against Burnham Chemical Company and Burnham Solar Process"; that in said Paragraph IX of said complaint certain allegations are made indicating conspiracies and combinations of certain of the defendants to injure plaintiff, all of which are omitted from the allega-

tions of said affidavit of January 14, 1930; Paragraph X, entitled "False and Misleading 'Report' by Dr. Andrew Stewart Concerning Investigation by U. S. Bureau of Mines"; Paragraphs XIII to XXVII, inclusive, and paragraph XXIX; that some portions of said paragraphs refer generally to said alleged conspiracies and combinations believed by affiant and said plaintiff, at the time of the filing of said complaint, to have existed but all of which allegations were omitted in the said affidavit of January 14, 1930 of affiant for the following reasons, to-wit: that between the date of the filing of said complaint, namely April 9, 1926, and the filing of said affidavit on January 14, 1930 affiant, as is more particularly hereinafter set forth, devoted a great portion of his time and attention in an endeavor to develop facts of said alleged conspiracies and combinations and to determine whether or not his suspicions that said defendants had conspired and combined in violation of the provisions of U.S. C.A. Sections 1 and 2, Title 15, were warranted, but between the time of the filing of said complaint and said affidavit affiant had not been able to secure or obtain any proof of the formation of such conspiracies or combinations, with the result that when it came to file said affidavit the suspicions of plaintiff as to the formation of such combinations and conspiracies had been lulled, due to representations and statements made to him by certain officers of defendants, particularly those of C. B. [106] Zabriskie, as alleged in Paragraph 75 of the complaint on file

herein, and also as a result of certain other investigations which affiant had made and more particularly hereinafter set forth, including, but not exclusively, his interviews with Department of Interior officials and Department of Justice officials and statements made by an attorney for United States Borax Company on a hearing had during the said interval in a proceeding in Los Angeles, likewise hereinafter referred to;

For the reasons above set forth affiant omitted in his said affidavit references to those paragraphs in said complaint so as aforesaid filed in the Fraud Order case and which embraces charges of conspiracies and combinations in violations of said Sections 1 and 2 of Title 15;

That the references in said complaint and said affidavit to "Borax Trust" did not have reference to violations of such Sections 1 and 2 of Title 15, but were used in the general popular use of the word "trust", as applied to those parties dominating an industry and such words were used in such popular sense and not in the technical sense of a cartel or trust or combination or monopoly in violation of said Sections 1 and 2 of Title 15; that it was not until after the Federal Government had filed its indictment and complaint in the United States District Court, in the fall of 1944, in and for the Northern District of California, and referred to in the complaint on file herein, that affiant or plaintiff herein had any definite knowledge or proof or concrete indication that defendants charged in the com-

plaint on file herein had formed such conspiracies and combinations prohibited by said Sections 1 and 2 of Title 15; that affiant and said plaintiff knew that at all of said time, up to the [107] filing of said Government indictment and complaint, that injuries were being suffered by plaintiff herein and that defendants, or some of them, named herein, were apparently the cause of such injuries; plaintiff herein and affiant had been advised, and had come to believe, that said injuries and damages were the result of the active and normal competition of defendants with plaintiff but at no time prior to the filing of said Government indictment and complaint did plaintiff or affiant have any proof or any knowledge of any kind, nature or description whatsoever, as to the combinations and monopolies formed and created by defendants herein in violation of said Sections 1 and 2 of Title 15; that affiant at all times after his suspicions were aroused as to the activities of said defendants, endeavored to the best of his ability to discover and ascertain whether or not such activities and such injuries and damages so caused plaintiff were the result of violations by defendants of said Sections 1 and 2 of Title 15 but as aforesaid was unable, although he diligently sought for the same, to obtain proof or evidence of such violations until, as aforesaid, the Federal Government took action as hereinabove set forth in the fall of the year 1944.

That the following is a statement of the activities of plaintiff and affiant in an endeavor to ascertain

whether defendants herein named were guilty of the violation of said Sections 1 and 2 of Title 15, to-wit:

(a) Post Office Fraud Order

June 20, 1925: On or about June 20, 1925, a Post Office fraud order was issued against plaintiff and affiant, as its President. Mail addressed to plaintiff at Reno, Nevada, was returned to sender by the Postmaster at Reno and marked "Fraudulent. Mail to this address returned by order [108] of Postmaster General". Affiant became suspicious that the fraud order might have been caused by defendants, or some of them. The only argument affiant had that would lead to such a suspicion was that, in affiant's opinion, the said plaintiff had done nothing fraudulent, in spite of the charges made by the Post Office Department, none of which charges was true. Defendants, or certain of them, were at said times competitors of plaintiff and would be the only ones to benefit by a fraud order against said plaintiff. Therefore, perhaps defendants, or some of them, caused the fraud order. However, affiant had no way of proving it even if it were true.

(b) Amended Complaint in Post Office
Fraud Order

April 6, 1926: The said plaintiff filed its amended complaint on April 6, 1926, against the Postmaster at Reno in said fraud order case. In said amended complaint, and particularly in Paragraph IX., page 18 thereof, plaintiff claimed that certain "Defamatory Propaganda by Borax Trust against Burnham

Chemical Company and Burnham Solar Process” influenced Dr. Andrew Stewart to make his derogatory “report” against said plaintiff which caused the Post Office fraud order. However, said plaintiff had no proof at said time that Dr. Andrew Stewart was influenced directly or indirectly, by said defendants or any one of them, or that said defamatory propaganda was caused by said defendants, or any one of them. Said plaintiff based its charges largely upon hearsay and upon the grounds that said plaintiff had done nothing fraudulent; that said defendants, or some of them, would be the only ones to gain by the fraud order issued against plaintiff; and therefore, said defendants, or one of them, probably caused the Post Office fraud order to be issued, and while said plaintiff subsequently gained information tending to prove said allegations to be correct, yet said plaintiff at said time had no [109] proof that said defendants, or any one of them, caused the fraud order.

(c) Statement by a Government Official

October 8, 1926: The President of Defendant Sterling Borax Company, and who was at the same time a highly placed Federal Government official and formerly had been, prior to his appointment to such a position, the Chicago Manager and representative of Defendant Pacific Coast Borax Company, stated on October 8, 1926 that he was responsible, in a measure, for having said fraud order issued against plaintiff. On several occasions thereafter, said plaintiff and said plaintiff’s attorney, and also affiant, endeavored to determine if said President of

Defendant Sterling Borax Company was responsible for having the fraud order issued because of his official government position, or because he wanted to benefit defendants, or any one of them, but all of said endeavors were of no avail. Said endeavors were made by personal interviews, or in other ways, and were made during the month of March, 1927, and the months of January and February, 1929, and again in the month of May, 1929.

(d) Cut in the Price of Borax

June, 1928: Said plaintiff started its commercial borax production in June, 1928, and the price of borax was cut by certain defendants herein from about \$60.00 a ton to about \$30.00 a ton in bags f.o.b. Searles Lake, during that first month of plaintiff's operations. Affiant's suspicions were aroused and affiant thought that perhaps the price cut was deliberately aimed at plaintiff to drive it out of business. Thereupon plaintiff consulted its attorneys, Francis J. Heney and B. D. Townsend, and asked them to express an opinion on the matter.

In order to secure additional legal opinion on the subject, Mr. Townsend wrote, on July 26, 1928, to his [110] friend H. Stanley Henricks, of the law firm of Bright, Thompson and Henricks in Washington, D. C. He inquired in regard to certain questions of law and to obtain his opinion as to whether any anti-trust law was being violated in the borax business. Affiant is informed and believes that Mr. Henrick's reply was, in effect that it would be diffi-

cult to prove even if it were true, because the controlling office of the two largest borax producers was in London.

(e) Conference with Townsend and Westend
Chemical Company

August, 1928: The price of borax continued to fall below \$30.00 a ton in bags, f.o.b. Searles Lake, after June, 1928, and reached a price of about \$18.50 a ton in bags, f.o.b. Searles Lake, by the spring of 1929—this price in bulk would be about \$16.00 per ton f.o.b. Searles Lake. An official of the Westend Chemical Company, a small producer of borax at Searles Lake, conferred with officials of plaintiff in August, 1928, to see what could be done to remedy the situation as the price of borax was continually going down. Said company and said plaintiff jointly conferred with Mr. B. D. Townsend on the matter and jointly employed Mr. Townsend to render an opinion. Mr. Townsend made an "examination of authorities and rendition of opinion pertaining to certain practices in the borax and potash trade and legal remedies available under the Federal Trade Commission, or otherwise." Mr. Townsend and the officials of the Westend Chemical Company, and the officials of said plaintiff discussed the matter from all angles. The Westend Chemical Company officials concluded there was no proof available that any anti-trust law was being violated and that the drastic cut in the price of borax was the natural result of the laws of supply and demand. There

was a [111] surplus of borax on the market and naturally the price of borax went down. Mr. Townsend admitted that he saw no way to prove any violation of the law.

(f) Mr. Townsend and Affiant Confer with the
Department of Justice

April, 1929: Mr. B. D. Townsend had formerly been employed by the Department of Justice in prosecuting several important legal matters for the Government and he had many friends in the Department. Affiant suggested that he confer with the Department of Justice to see if it had any suggestions, or any information that would support a charge of any violation of the Anti-trust laws by the defendants, or any one of them. Thereupon, Mr. Townsend and affiant went to Washington, D. C. in April, 1929, and called upon the Department of Justice in regard to the matter. Mr. Townsend had several conferences and the results of the conferences were that, since both the defendant American Potash and Chemical Corporation and the defendant Pacific Borax Company, were owned and controlled by foreign interests, it would be impossible to determine if there was any conspiracy between them to squeeze out competition by staging a price war.

(g) Affiant's Talk with Mr. Zabriskie
and Mr. Emlaw

May 17, 1929: Affiant called upon Mr. Chris B. Zabriskie, Vice-president and General Manager of defendant Pacific Coast Borax Company, at his

office in New York City on May 17, 1929, and accused him of cutting the price of borax to drive said plaintiff out of business in violation of the anti-trust laws. Mr. Zabriskie said that they were not trying to injure the Burnham Chemical Company and his company was not violating any anti-trust law. Mr. Zabriskie said they had a cheaper source of borax and the reduction in price was a matter of supply and demand. [112] The supply was greater than the demand and the price of borax had to go down. Mr. Zabriskie was very firm, persuasive and convincing in his statements, and affiant went away from his office believing that what he said was true.

Affiant also called upon Mr. H. S. Emlaw, General Manager of defendant American Potash and Chemical Corporation, at his office in New York City on May 17, 1929, and discussed with him the borax price situation. Mr. Emlaw confirmed the statement made by Mr. Zabriskie that there was a surplus of borax on the market and that they had difficulty in selling the large quantity of borax in their warehouse, and yet they had to sell it in order to make room for more borax that was being continually made as a by-product in their potash production and therefore the price of borax had to go down.

(h) Attorney of Defendant United States Borax Company Denies There was any Monopoly in Borax.

July 1, 1929: Mr. B. D. Townsend and affiant attended the hearing in Los Angeles before the

Register of the United States Land Office in regard to the validity of a certain mining location made by the defendant United States Borax Company, a subsidiary of defendant Borax Consolidated, Ltd.

In the course of cross-examination, on July 1, 1929, of Mr. C. M. Rasor, who was a witness for defendant United States Borax Company, Mr. Townsend sought to determine whether defendant United States Borax Company was an agent of a world monopoly of borax. The implication was heatedly denied by Mr. William E. Colby, attorney for defendant United States Borax Company. Mr. Colby stated substantially as follows:— “So far from seeking to create a monopoly of borax supply of the world, it always has been and now is the policy of the United States Borax Company to maintain competition in the [113] borax field.”

As a result of the statements by Mr. Zabriskie, Mr. Emlaw and Mr. Colby, said plaintiff and affiant concluded that there was no violation of said Sections 1 and 2 of Title 15, and said plaintiff and affiant thereby were lulled into inaction.

(i) Affidavit of G. B. Burnham in Post Office
Fraud Order January 14, 1930

January 14, 1930: In connection with the said Post Office fraud order suit, which was about to come to trial in Carson City, Nevada, affiant filed an “Affidavit in Support of Motion for Temporary Injunction.” In the affidavit, affiant omitted all charges that there was any violation of Anti-trust laws by the Borax companies in view of what Mr.

Zabriskie and Mr. Emlaw had told affiant on May 17, 1929, and what the attorney, William E. Colby, had said on July 1, 1929, to the effect that defendants, Pacific Coast Borax Company and United States Borax Company were not violating any Anti-trust law and that, on the contrary, they were endeavoring to "maintain competition in the borax field."

(j) Burnham Chemical Company Continues
Development of Its Lease

1929 to 1933: After plaintiff's borax plant was closed down in January, 1929, as described in plaintiff's complaint herein, plaintiff continued the development of its lease at Searles Lake for a number of years in the hopes that it could renew its borax production, and also in anticipation that it would acquire a sodium lease on the Little Placer Claim in the Kramer Borax District, 65 miles southwest of Searles Lake, and it thereby would be able to supply its borax refinery at Searles Lake with the cheap source of crude sodium borate known to be contained in the Little Placer Claim. Said plaintiff developed its [114] process for making potassium sulphate and common salt and it made 400 tons of common salt and sold most thereof. A description of what said plaintiff did is shown in the letters to the Secretary of the Interior and which were submitted by Mr. Moses Laskey in his affidavit of January 1946, in behalf of the defendants, or some of them.

(k) Pacific Coast Borax Company Sues American Potash and Chemical Corporation

1931 to 1932: Defendant Pacific Coast Borax Company sued defendant American Potash and Chemical Corporation for an infringement of its chemical process under United States Letters Patents, in United States District Court in Los Angeles, California, File P-115-J. A determined legal struggle was carried on and many patent attorneys employed. Affiant followed the case in a general way and understands the evidence and documents were extraordinary voluminous. The effect on the officers of plaintiff and particularly upon affiant was that the two major groups of defendants herein were entirely independent and that there was no collusion of any sort between them, or any conspiracy in violation of the Anti-trust laws, thus plaintiff was further lulled into inaction.

(l) Burnham Chemical Company Finally Denied Lease on the Little Placer Claim

May 19, 1933: The Department of the Interior, through its General Land Office at Los Angeles, California, finally denied plaintiff's application for a lease on the Little Placer Claim, which said plaintiff was counting on as a source of crude borax to renew operations of its borax factory at Searles Lake. Affiant felt so reasonably certain that plaintiff would obtain the Little Placer Claim that affiant's suspicions were again aroused when its application for the Little Placer Claim was denied. Affiant believed that probably defendants, or some of

them, were violating the Anti-trust laws because if Defendant United States Borax Company finally acquired patent to the Little Placer Claim it would tend to further increase its monopoly of sodium borate in the said Kramer District. [115]

For a further detailed statement of plaintiff's endeavors to secure a lease upon said Little Placer Claim, and of the opposition of certain of the defendants herein to said endeavors of plaintiff, affiant refers to and incorporates herein, as fully as though specifically set forth herein, Paragraph 77 to 80, inclusive, of said complaint of plaintiff on file herein; that since said judgment was rendered against said defendants, or some of them, in said Anti-Trust indictment and action by the District Court of the United States, in and for the Northern District of California, plaintiff continued its efforts to secure, and now has pending its application for, a lease on said Little Placer Claim.

(m) Conference with Mr. Louis Glavis

August, 1934: As a result of plaintiff's great disappointment in not securing a lease on the Little Placer Claim, which would have been its salvation and would have enabled it to renew the operation of its plant at Searles Lake, affiant decided to go to Washington, D. C., to discuss the matter with Government authorities there. Judge Francis J. Heney gave affiant a letter of introduction to Mr. Louis Glavis, Bureau of Investigation, Interior Department, Washington, D. C.

Upon arriving in Washington about August 19, 1934, affiant presented his letter of introduction to Mr. Louis J. Glavis and discussed with him and with Mr. B. W. McLaughlin, his assistant, the situation in the Kramer Borax District and the fact that said plaintiff did not get a lease on the Little Placer Claim. Affiant brought up the question of the legality of giving patent to the land to the United States Borax Company. Affiant also discussed the fact that that company was gradually monopolizing all of the borax deposits at Kramer. Affiant discussed the matter with several other men in the Department of the Interior.

Affiant's talk with Mr. McLaughlin, who was Mr. Glavis' assistant, was encouraging because affiant felt that he and Mr. Glavis looked at the situation from plaintiff's point of view. However, neither of them [116] could say anything definite because they would have to await a report from the Office of the Solicitor.

Nevertheless, affiant was sufficiently encouraged in the possibility that defendants, or some of them, were probably violating the sodium leasing act; that affiant wrote to the Secretary of the Interior his letters of September 21, 1934 and November 28, 1934, heretofore submitted in the affidavit of Mr. Moses Lasky, entitled "Further Affidavit of Moses Lasky in Support of Defendant's Motion to Dismiss and For a Summary Judgment," which letters practically charged defendants, or some of them, of fraudulently securing patents to the sodium borate deposits in the Kramer District be-

cause by obtaining ownership the defendants, or some of them, could create a monopoly; likewise, if they tried to lease the deposits under the sodium leasing act, they would be attempting to evade the law because they were all foreign owned companies and the leasing act definitely stated that "citizens of another country shall not, by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of the Act," meaning the general Leasing Act. A copy of affiant's September 21, 1934 letter was sent to Mr. Louis Glavis of the Office of Investigation.

In affiant's letter of November 28, 1934, affiant pleaded with the Secretary of the Interior not to cancel plaintiff's lease at Searles Lake because, as long as plaintiff held that lease, there was no monopoly on borax. Furthermore, plaintiff could produce borax immediately in the event borax prices increased, and therefore defendants would have no absolute monopoly on production.

(n) Nathan B. Margold's Letter to the Secretary of the Interior Dated July 22, 1935.

July 31, 1935: Mr. Harry Slattery, personal assistant to the Secretary of the Interior, wrote affiant a letter dated January 31, 1935. which was in effect the final answer to affiant's letters of September 21, 1934, and November 28, 1934, to the Secretary of the Interior hereinbefore mentioned. Mr. Slattery enclosed a mimeographed [117] copy of a letter written by Nathan B. Margold, Solicitor, to the Secretary of the Interior, dated July 22, 1935. Mr.

Margold had been asked to consider a memorandum from the Director of Investigations of the Department of the Interior regarding the legality of granting patents to certain sodium borate lands in the Kramer Borax District to defendant United States Borax Company. Mr. Margold stated in his letter that "Nothing is seen in the present record that would constitute sufficient evidence to seek to set aside the patent for fraud." Mr. Margold, the Solicitor, had studied the facts and the law on the subject thoroughly and so affiant concluded that defendants United States Borax Company, Pacific Coast Borax Company and Borax Consolidated, Ltd., had done nothing illegal under the leasing laws or anti-trust laws. If the Solicitor of the Department of the Interior, after his exhaustive search, found nothing illegal, then all affiant's suspicions that said defendants were violating the leasing laws and the Anti-trust laws were groundless. Thereupon affiant and the plaintiff herein, although their suspicions had been aroused, were again lulled into inaction.

(o) Plaintiff Continued Activities

1930-1937: The United States District Court in the District of Nevada, Carson City, Nevada, granted the plaintiff herein on February 3, 1930, a temporary injunction forbidding the Postmaster at Reno, Nevada, from carrying out the Post Office fraud order. The injunction was granted because the Court saw no evidence of fraud. Plaintiff thereupon began to receive its mail.

Shortly after the temporary injunction was granted, the attorney for the plaintiff, Mr. B. D. Townsend, had to go to a hospital for an operation, but it was planned to have another hearing in Court to ask that the temporary injunction be made permanent. The hearing was to be held just as soon as Mr. Townsend fully recovered from his illness.

Because of the temporary injunction and the fact that plaintiff could receive its mail, some of the stockholders were thereby encouraged to supply plaintiff with additional funds to continue [118] development of plaintiff's lease at Searles Lake. It was planned to recover potassium sulphate, sodium chloride, borax and other chemicals from the brine. By making several products, certain items in the cost of producing borax could be distributed over the cost of recovering other chemicals. In this way, the Company could continue operations even though the price of borax might be cut below \$18.00 a ton f.o.b. Searles Lake.

As a step in the further development of plaintiff's lease, during the years 1930 to 1933 inclusive, plaintiff carried on extensive experiments in the development of its process for producing potassium sulphate and it also built a semi-commercial plant for making common salt, and made 400 tons of such salt. Altogether, plaintiff spent \$49,048.59 from 1930 to 1933 inclusive, in the development of its deposits at Searles Lake. At the same time, plaintiff was counting heavily upon obtaining a lease on the Little Placer Claim to enable it to resume operations of its borax plant.

Nearly all of the potassium sulphate consumed in the United States was imported from Europe and plaintiff believed it should be entitled to a development loan from the Reconstruction Finance Corporation to build a potassium sulphate plant. It would be in the public interest to make the United States independent of a foreign supply of potassium sulphate because it is an important chemical fertilizer. Such production would be non-competitive in the United States because practically no one else in the United States was making potassium sulphate, and what little was made was in very limited quantities.

The Reconstruction Finance Corporation was authorized by Congress to make development loans for some non-competitive minerals, but the law did not provide for loans for potassium sulphate development, and which plaintiff believed was an oversight by Congress. Plaintiff's stockholders residing in Philadelphia, Pennsylvania, explained the situation to the Honorable M. J. Stack, a Member of the House of Representatives from Philadelphia. Thereupon, Mr. Stack introduced House Bill H. R. 6188 in the House of Representatives on February 26, 1935. [119] The title of the Bill was "To Authorize the Reconstruction Finance Corporation to Make Loans to Aid in the Development of the Recovery of Potassium Salts and Other Minerals."

For about two years considerable effort was made to get the bill passed, but without success, and affiant, and particularly the Philadelphia stockholders, became suspicious that its failure to pass was due to the influence of the defendants herein, or some of

them. Furthermore, plaintiff was about to lose its lease at Searles Lake for non-payment of rent and so the Philadelphia stockholders decided to continue their effort to help plaintiff by appealing to Congress for assistance, because all other appeals to the Department of the Interior had failed.

In addition, between 1928 and 1935, affiant held many conferences with plaintiff's attorney, Mr. B. D. Townsend, at times when his health seemed slightly improved, in regard to the question as to whether or not plaintiff had sufficient proof to bring a cause of action against defendants, or any of them, under the Anti-trust laws. Mr. Townsend stated the law on these occasions and explained that as long as there was genuine competition between the competitors there was no cause of action, but if there was an agreement between the competitors, or if for example one person or one company controlled both defendant American Potash and Chemical Corporation and defendant Borax Consolidated, Ltd., then there would be a monopoly since they would be under one single control.

On one particular occasion, about 1934, Mr. Townsend suggested that affiant investigate to see if some one company, such as the Goldfield Consolidated of South Africa, controlled both defendant American Potash and Chemical Corporation and defendant Borax Consolidated Ltd., affiant searched continuously for some such connection or agreement between such companies but was never able to find any such single control or agreement until the Government brought its action against defendants, or some of them, in the Fall of 1944. [120]

(p) The Philadelphia Resolutions

July 17, 1937: The stockholders of plaintiff, and particularly those stockholders residing in Philadelphia, Pennsylvania, could not understand why the Government would grant most of the potash and borax deposits in the United States to foreign owned interests and yet proceed to take away the deposits held by plaintiff at Searles Lake, upon which plaintiff, with the aid of its 7,000 United States Citizens, had spent \$1,168,564 in development, and which represented an investment of about \$1,500,000.00 by those American Citizens.

Therefore, a meeting of the Philadelphia stockholders of plaintiff was held in Philadelphia, Pennsylvania, on June 17, 1937 and at that meeting affiant explained to the stockholders the very unfortunate situation of plaintiff. Affiant explained that plaintiff was about to lose its Government lease at Searles Lake, due to non-payment of rent, and under the terms of the lease, if the rent was not paid, the lease could be cancelled, and affiant recommended that the stockholders take some definite action to either raise the money to pay the lease rent or appeal to the Government not to cancel the lease, or continue with their efforts to get the Government to render plaintiff financial aid.

The Philadelphia stockholders thoroughly discussed the situation from all angles and finally passed resolutions urging the Government not to cancel the potash lease of plaintiff at Searles Lake, California, which would result in the loss of about \$1,500,000.00 investment of the stockholders, and

which investment in Government property was made in good faith. The resolutions also asked the Government for a lease on some of the known borate deposits at Kramer, California, (such as the Little Placer Claim), and financial aid to enable plaintiff to get into large scale production of all the various salts at Searles Lake, as well as at Kramer, and thereby compete with foreign owned interests that were monopolizing the potash and borax deposits of the United States. The resolutions pointed out the injustice of the Post Office fraud order against the plaintiff herein and implored the Government to render a helping hand to the 7,000 citizens of the United States who were the stockholders of plaintiff. [121]

The Philadelphia Resolutions also pointed out that under the Sodium Leasing Act of February 25, 1920, all prospectors on the public domain were charged with notice that they could not lawfully seek or mine for sodium borate under the guise of a mineral location; that in August, 1925, the largest deposit of sodium borate in the world was discovered at Kramer, California; that a "foreign owned borax trust" had acquired outright ownership to the deposits, but if the Government had granted plaintiff a lease on certain of the known sodium borate lands at Kramer soon after plaintiff had made its application for a lease on the same, plaintiff would have been a successful enterprise.

The Philadelphia stockholders questioned the legality of the foreign owned interests monopolizing the potash and borax of the United States. In fact,

the resolutions strongly denounced the actions of the Government in permitting foreign owned interests to acquire so much of the nation's valuable potash and borax deposits.

A copy of the resolutions, with a letter, was sent to the President of the United States on June 22, 1937, to the Secretary of the Interior, to certain Members of Congress, and to other Government Officials.

(q) The Commissioner of the General Land Office Answers the Philadelphia Resolutions.

July 2, 1937: The Commissioner of the General Land Office wrote a letter to Mr. Frank B. Stockley, an attorney and Chairman of the Philadelphia stockholders of plaintiff, and stated, among other things, the following:

"Some reference was made in the resolutions to the general policy of the Government toward the potash industry and as to sodium, borax and similar products. In this connection, it may be noted that the United States Senate in 1936 authorized its Committee on Public Lands and Surveys to make an investigation concerning the potash industry, which investigation has not yet been completed. The views of this Department relative to sodium, borax and similar mineral products are set forth in the decision found in I. D. Volume 54, page 183, case of *Burnham Chemical Company vs. United States Borax Company and Western Borax Company; United States Intervener.*" [122]

The decision found in I. D. Volume 54, page 183, upholds the actions of the United States Borax Company and the Western Borax Company in their acquisition of the sodium borate deposits at Kramer and denied plaintiff's application to a lease on the Little Placer Claim.

In other words, as late as July 2, 1937, the General Land Office saw nothing illegal in all that had been done at Kramer and all the stockholders' suspicions that the borax people were violating the Anti-trust laws were groundless.

(r) The New York Resolutions

August 9, 1937: A meeting of the New York stockholders of plaintiff was held on August 9, 1937, and affiant discussed with them all the injustices that plaintiff had suffered and the fact that plaintiff was about to lose its potash lease and borax plant at Searles Lake. Affiant told them of the resolutions that the Philadelphia stockholders had just passed and affiant showed them the July 2, 1937 letter received from the Commissioner of the General Land Office. Affiant explained to them all the angles to the situation and urged that they raise funds to pay the lease rent so that plaintiff's lease would not be cancelled, or else take some other steps to save the situation. After thoroughly discussing the matter, the New York stockholders decided to pass resolutions similar to those of the Philadelphia stockholders, but to bring out certain points that would, in a way, be an answer to the Commissioner's letter of July 2, 1937.

Copies of the resolutions were sent to the Potash Investigating Committee of the United States, to the Secretary of the Interior and to other Government officials, but all to no avail.

The stockholders of plaintiff tried their best to show the Government all the wrong that had been done to plaintiff, but instead of getting the Government to lend them a helping hand, the Post Office fraud order was reinstated against plaintiff the very next month, in September, 1937. Incidentally, prior thereto said action of plaintiff [123] pending at Carson City, Nevada, in which plaintiff had obtained an injunction against said fraud order, ex-parte, and without notice to plaintiff of any hearing thereon, was dismissed.

Affiant concluded that the activity of its stockholders and itself was making the Government angry and making the situation worse instead of better; The Philadelphia and New York resolutions vigorously denounced the Department of the Interior on the grounds that it was helping foreign owned interests to build up a vast monopoly of potash and borax in the United States. The resolutions implied that such a monopoly would be in violation of the Anti-trust laws, although they did not definitely say so.

The reinstatement of the Post Office fraud order was a "slap in the face" at 7,000 United States Citizens: It meant that the Government was right and the stockholders were wrong.

Affiant therefore reluctantly concluded that there must be no illegal monopoly (or if there was it was

impossible for plaintiff or affiant to obtain evidence thereof) and everything that had been done by defendants, or some of them, and by the Department of the Interior was perfectly legal.

(s) Plaintiff Makes Final Appeal to Raise
Money to Pay Lease Rent

September 3, 1937: Plaintiff sent a letter on September 3, 1937, to all its stockholders making a final appeal to raise money to pay its lease rent at Searles Lake and plaintiff enclosed a copy of the Philadelphia Stockholders resolutions. This was prior to the reinstatement of the Post Office fraud order.

During the latter part of September, 1937, the exact date not being known, the Post Office fraud order against plaintiff was reinstated as aforesaid.

Plaintiff was not consulted regarding the reinstatement of the fraud order. There was no warning or even any hint that the fraud order would be reinstated. There was no false statement in plaintiff's letter, or in the resolutions that plaintiff knew of. Every statement was truthful. The reinstatement of the fraud order was a terrific blow to plaintiff, who was struggling to survive. [124]

Plaintiff, as well as affiant, as aforesaid, concluded finally that the Government did not like the continual harping on the question as to whether or not it was legal for foreign-owned interests to monopolize nearly all the potash and borax in this country. The inference plaintiff gathered was that such a monopoly was legal because the Government

upheld everything that was done and plaintiff was a fraud for questioning the matter. Plaintiff was thereupon again lulled into inaction.

(t) The Conference With Mr. H. S. Emlaw
and F. C. Baker

October 19, 1937: Affiant conferred with Mr. H. S. Emlaw and Mr. F. C. Baker, officials of defendant American Potash and Chemical Corporation, in their office in New York City, to see if they would be interested in financing plaintiff's potash lease at Searles Lake, or drill for borax on plaintiff's prospecting permit on lands near Kramer. However, they were not interested. They stated that when their company obtained its patented land at Searles Lake from the Government (about the year 1918) it agreed with the Government that it would not finance, or make any deal with any other lessee at Searles Lake, or with anyone else, that would establish, or tend to establish, a monopoly.

They stated to affiant that the Goldfields Consolidated of South Africa (an English corporation) or its affiliated interests, and other English people, held 80% interest in defendant American Potash and Chemical Corporation. They also stated that there was no connection between their company and the Pacific Coast Borax Company or the Borax Consolidated, Ltd., of London; in the fall of 1942 affiant for the first time learned that such statements as to ownership by said English corporation were false; in the fall of 1944 affiant likewise

learned that the rest of said statements were false, but at the time of the making of said statements affiant believed them and was further lulled into inaction. [125]

(u) Cancellation of Plaintiff's Lease

January 31, 1938: Plaintiff's lease at Searles Lake was cancelled, stay of judgment expired and plaintiff lost all its assets at Searles Lake.

(v) Talk With Mr. Bradshaw:

November 17, 1939: Affiant had heard that American Potash & Chemical Corporation had made an application for a lease on the deposits at Searles Lake, formerly held by plaintiff. Affiant thereupon went to Washington, D. C., and talked with Mr. Bradshaw, Chief of Division N, United States Land Office, Department of the Interior. Mr. Bradshaw looked after mineral applications. Affiant talked with him relative to the application of American Potash & Chemical Corporation for a lease on additional Searles Lake Land. Said corporation put in a bid not only for the deposits formerly held by plaintiff but for additional lands as well, making a total of about 6,000 acres. Affiant stated that if the Government granted a lease to such corporation that already had much of Searles Lake deposits, it would aid in building up a monopoly in potash and borax in the United States; that American Potash & Chemical Corporation was an English owned company (which affiant thought at that time was the case, whereas, it was German

owned), that that Pacific Coast Borax Company was also an English owned company, it being a subsidiary of the Borax Consolidated, Ltd.; that these companies had their controlling offices in London and that they produced much of the potash and borax in the United States. Affiant said that perhaps there was an understanding between such companies to fix the price of potash and borax, and that perhaps after all, they were in collusion since they both had their head offices in London. Affiant pointed out that the leasing law prevented granting any lease to anyone who was violating any Anti-trust law.

To this, Mr. Bradshaw quickly replied that defendant American Potash and Chemical Corporation and defendant Borax Consolidated, Ltd., were absolutely separate and there was no connection between them. He said it with a tone of authority, so affiant concluded [126] that he had positive knowledge on the subject. Affiant decided that his own conjecture was wrong and therefore that there was no connection between the two companies, and there was no conspiracy or monopoly in violation of the Anti-trust laws.

(w) Affiant Again Confers With the
Department of Justice

November 17, 1939: Affiant conferred with Mr. Wendell Berge of the Department of Justice at his office in Washington, D. C., on November 17, 1939, and discussed with him the investigation that the Department was at that time making concerning

the alleged violation of the Anti-trust laws by the Fertilizer Industries. Affiant explained that potash was an important fertilizer and that one large producer of potash, namely defendant American Potash and Chemical Corporation, also produced borax and was controlled by English interests, and another large producer of potash, namely the United States Potash Company, was controlled by defendant Borax Consolidated, Ltd., which was also another English owned company. Therefore, affiant stated that the English owned borax producers had an influence on the price of potash.

Mr. Berge said that because the controlling interests of the two major borax producers were outside of the United States it was difficult to obtain proof of any violation of Anti-trust laws.

Affiant explained the history of plaintiff to Mr. Berge and discussed the drastic cut in the price of borax that occurred the month plaintiff started its commercial borax production. Affiant also gave Mr. Berge a copy of the letter written by plaintiff's attorney, Mr. B. D. Townsend, to Mr. H. S. Henricks, dated July 26, 1928, and heretofore mentioned in subdivision (d) hereof, and also other data and information concerning the borax industry which might be useful in determining whether there was any violation of anti-trust laws.

Mr. Berge stated they would give the matter consideration and asked me to write to them briefly on the subject discussed. He suggested that I address the letter to Mr. Thurman W. Arnold, Assistant Attorney General, but direct to his attention.

Whereupon [127] affiant confirmed the conversation in a letter dated November 22, 1939, to Mr. Thurman W. Arnold.

(x) The Protest Against Leasing Searles Lake Lands to Defendant American Potash and Chemical Corporation.

November 18, 1939: The revised potash leasing act, approved February 7, 1927, and entitled: "An Act to Promote the Mining of Potash on the Public Domain" (Public No. 579 - 69th Congress), states, under Section 5, that the provisions of Section 1 and 26 to 38 inclusive of the General Leasing Act of February 25, 1920 (Public No. 146-41 Stat. 437) are made applicable to include potassium.

Under Section 27 of the General Leasing Law it states: "That if any of the lands or deposits leased under the provisions of this act shall be . . . possessed or controlled . . . in any manner whatsoever, so that they form a part of, or are in any wise controlled by any combination in the form of an unlawful trust . . . or any agreement or understanding, written, verbal or otherwise, to which such lessee shall be a party, of which his or its output is to be or become the subject, to control the price or prices thereof . . . the lease thereof shall be forfeited by appropriate court proceedings."

A similar restriction regarding monopoly is provided in Section 30. Affiant learned that during 1939 Defendant American Potash and Chemical Corporation and other fertilizer companies were being investigated by the Anti-Trust Division of

the Department of Justice for alleged violation of the Sherman Anti-Trust Act. Defendant American Potash and Chemical Corporation also had entered a bid for a lease on about 6,000 acres of potash and borax land at Searles Lake on October 19, 1939 in spite of the investigation being made on it for violation of the anti-trust laws.

On November 18, 1939, affiant protested to the Secretary of the Interior against the granting of any such lease, or leases, to said Defendant American Potash and Chemical Corporation, because it already held 3,319 acres of the Searles Lake deposit, and because of the very fact that an investigation was then, at that time, being made of said defendant's alleged violation of the Anti-Trust Law. [128]

(y) Department of Justice Asked for
Documentary Evidence

December 8, 1939: Mr. Charles C. Pearce, Special Assistant to the Attorney General, Department of Justice in New York City, wrote to affiant for documentary evidence which might be in affiant's possession sustaining the views expressed in affiant's letter of November 22, 1939, and thereupon affiant gave the Department of Justice additional information. On December 18, 1939, January 5, 1940, and January 30, 1940, affiant wrote letters to the Department of Justice and, subsequent thereto, other officers of plaintiff gave the Department of Justice additional information.

(z) Affiant Asks Department of Justice
for Assistance

December 18, 1939: Affiant wrote on December 18, 1939, to Charles C. Pearce, of the Department of Justice, who was conducting the investigation of the Fertilizer Industries, and explained that if plaintiff could get into potash production at Searles Lake and develop the solar process for making potash as is being done on the Dead Sea in Palestine, affiant believed that it would afford a cheap source of potash for the American farmer, and affiant stated that the Government should help plaintiff develop its solar process for producing potash and chemicals from Searles Lake brine.

(a-a) Department of Interior Found No
Violation of Anti-Trust Laws

March 5, 1940: On March 5, 1940, the Commissioner of the General Land Office answered affiant's letter of November 18, 1939 and stated among other things that: "The American Potash and Chemical Corporation was found qualified under the law to take and hold potash leases on the public domain." A lease on the 6,000 acres of potash and borax land at Searles Lake was thereafter granted to Defendant American Potash and Chemical Corporation. Affiant, therefore, was led to believe that there was no unlawful trust or monopoly in the potash or in the borax [129] business and therefore there was no conspiracy against plaintiff because, under the potash leasing law, the Department of the Interior could not grant a potash lease, if any

conspiracy or monopoly did exist in violation of the law. Certainly, if the Department of the Interior could find no violation of the Ant-Trust Laws, then affiant and plaintiff had no grounds for believing that any such violations existed and, as a result thereof, neither plaintiff nor affiant learned or attained any information to the contrary until the fall of 1944 when the Federal government filed its said indictment and complaint in the United States District Court, in and for the Northern District of California.

(b-b) Further Endeavors of Affiant to Discover
Facts of Anti-Trust Law Violations

1940-44: From March, 1940 to the fall of 1944, affiant continued to search for any information that would indicate that defendants, or some of them, had violated or were violating the Anti-Trust Laws but, in spite of such efforts, could not discover any evidence warranting a charge of violation of such Anti-Trust Laws.

However, during the month of October, 1942, affiant learned that the Alien Property Custodian had seized 90% of the capital stock of Defendant American Potash & Chemical Corporation by reason of the fact that said Custodian had ascertained that such stock was owned by citizens of Germany; at the same time, affiant ascertained that said German citizens had secured said stock in 1929 from British interests. This was the first knowledge that plaintiff or affiant had that the controlling interests of Defendant American Potash & Chemical Corporation and Defendant Borax Consolidated, Ltd.,

were owned by citizens of different nations. By reason of said information, affiant became further convinced and believed that there was no connection between said defendants nor was there likely to be any agreement between them in violation of the Anti-Trust Laws; that affiant had [130] no knowledge or information or means of knowledge or information that said German citizens had joined with said British interests in the formation of the Borax Cartel disclosed by the said Federal government when it filed its said indictment and said action on September 14, 1944 against said defendants, or most of them, in the United States District Court, in and for the Northern District of California, as has been hereinabove set forth. [131]

As to the Affidavit of J. C. Lynch

Affiant has read the affidavit of J. C. Lynch filed herein. The prices for borax as shown therein are generally, but not always, lower than the prices shown in the trade magazines for the same periods of time. Affiant has read many articles on borax and made a record of many price quotations on borax as shown in chemical magazines. The Burnham Chemical Company was in direct communication with buyers of borax during the years from 1924 to 1929 and occasionally thereafter. Information on prices prior to that time was gathered from reliable sources and is believed to be correct, and affiant therefore alleges that in the year 1874 the price of refined borax was \$130.00 per ton delivered, eastern territory. The delivered price temporarily advanced to \$220.00 and \$260.00 per ton, but de-

clined again. Prices from 1885 to 1900 fluctuated within the range of \$120.00 to \$160.00 per ton delivered. The price subsequently declined slowly to \$75.00 per ton in 1914. During and following World War I, the prices advanced and then declined as follows:

1914		\$ 75.00 per ton delivered Eastern territory
1915	\$ 85.00 to	125.00 per ton delivered Eastern territory
1916	125.00 to	135.00 per ton delivered Eastern territory
1917	135.00 to	140.00 per ton delivered Eastern territory
1918	140.00 to	145.00 per ton delivered Eastern territory
1919	145.00 to	165.00 per ton delivered Eastern territory
1920	165.00 to	155.00 per ton delivered Eastern territory
1921	155.00 to	105.00 per ton delivered Eastern territory

Prices previously shown herein and also those shown in affidavit by J. C. Lynch are prices delivered eastern territory in barrels or bags. The price in bulk at the plant is therefore affected by varying freight rates and cost of packaging. During the period when plaintiff sold [132] its borax in 1928, 1929 and 1930, the freight to New York and other eastern points was \$19.50 per ton in car lots of 80,000 pounds; July 1, 1930, through freight by rail to Galveston, and boat to New York was \$15.00 per ton, and the all rail rate to eastern points was reduced December 1, 1930 to \$16.00 per ton.

All borax produced and delivered to eastern and foreign markets by plaintiff in 1928 and 1929 was packed in burlap bags with either cotton or paper linings. Burlap bags with cotton lining cost approximately \$6.00 per ton. Affiant was informed and believes that in 1928 American Potash & Chemical Corporation started packing borax in double paper bags and plaintiff contemplated using similar bags

had it resumed operations after closing down the plant in January, 1929, which would have resulted in a saving of approximately \$3.50 per ton. The price advance of November 11, 1929, shown in affidavit of J. C. Lynch from \$44.00 per ton to \$47.00 per ton is \$3.00 a ton. However, the decreased freight on July 1, 1930 was \$4.50 a ton. Also, the use of cheaper bags made a saving of \$3.50 a ton. Therefore, by taking into account the reduced freight and cheaper bags, there was an advance in bulk borax at the plant by July, 1930, of \$11.00 a ton.

By making allowances for freight and the cost of bags and omitting the prices of borax during the abnormal times of World War I, and the period immediately following World War I, the price of borax in bulk f.o.b. Searles Lake, using prices shown by J. C. Lynch from 1921 to 1942 was approximately as follows: [133]

Date	Price of Borax Eastern Territory	Deductions for Freight	Deductions for Bags (Approx.)	Price in bulk f.o.b. Searles Lake (Approx.)
Spring, 1914.....	\$ 75.00	\$21.00	\$6.00	\$48.00
Aug. 15, 1921.....	105.00	(Approx.) 21.00	6.00	78.00
May 12, 1924.....	95.00	(Approx.) 21.00	6.00	68.00
Oct. 25, 1926.....	80.00	19.50	6.00	54.50
Sept. 19, 1927.....	75.00	19.50	6.00	49.50
June 7, 1928.....	60.00	19.50	6.00	34.50
June 28, 1928.....	50.00	19.50	6.00	24.50
April 19, 1929.....	44.00	19.50	2.50	22.00
Nov. 11, 1929.....	47.00	19.50	2.50	25.00
July 1, 1930.....	47.00	15.00	2.50	29.50
March 23, 1932.....	36.00	15.40	2.50	18.10
June 17, 1935.....	40.00	16.00	2.50	21.50
June 7, 1937.....	42.00	16.40	2.50	23.10
July 1, 1938.....	43.00	17.60	2.50	22.90
Feb. 6, 1942.....	45.00	17.60	2.50	24.90

Affiant denies that said prices set forth by said J. C. Lynch are correct in all instances.

In said affidavit of J. C. Lynch, the price of borax on April 19, 1929 is shown as \$44.00 per ton eastern territory, but affiant alleges that defendants, or some of them, were selling borax below \$44.00 per ton in said territory and even as low as \$38.00 per ton. Such a price would correspond to \$16.00 a ton in bulk f.o.b. Searles Lake.

Plaintiff shipped its last carloads of borax, which it had on hand in its warehouse at Searles Lake, in October, 1929 whereupon defendants, or some of them, raised their prices of borax on November 11, 1929. Affiant has in his possession a copy of a price schedule of Defendant Pacific Coast Borax Company showing the price of \$50.00 a ton for borax in bags f.o.b. Pacific Coast Terminal Points, such [134] as at Wilmington, California. Such a price advance corresponds to a bulk price of about \$42.00 f.o.b. Searles Lake, California. Plaintiff's principal market for its borax had been in the eastern part of the United States and in Europe where plaintiff was obliged to compete with the low price fixed by Defendant Pacific Coast Borax Company, but as soon as plaintiff shipped all of its carload borax, Defendant Pacific Coast Borax Company thereupon advanced its price to \$47.00 in eastern territory, and, in California, where it mines and refines its borax, advanced the price thereof to even a greater degree.

Some of the last carload shipments of borax from plaintiff's warehouse at Searles Lake, California, was consigned to a warehouse in the eastern territory and sold by plaintiff at various times during the year of 1930.

Defendant Borax Consolidated, Ltd., had refineries in New Jersey, Great Britain, and Continental Europe. Kernite ore from Defendant Pacific Coast Borax Company's mine at Kramer, California, was shipped in crude form to these refineries and processed there for market. Kernite contains only four molecules of water, whereas commercial borax contains ten molecules of water. One ton of Kernite produces about 1.39 tons of commercial borax. Had plaintiff secured a lease on the Little Placer Claim, plaintiff would have had buyers in Europe with refineries to purchase Kernite ore which could have been shipped at equal savings and plaintiff would have used its Searles Lake plant to process borax for the domestic market.

In order to offset the advantage held by Kernite because of its low water content, Defendant American Potash & Chemical Corporation and the West-end Chemical Company both developed processes of reducing standard commercial borax to anhydrous borax, thus making additional [135] savings in packaging and in freight to market. One ton of anhydrous borax equals 1.89 tons of standard commercial borax. Had plaintiff continued to produce borax there would be no reason why plaintiff could not also have produced anhydrous borax with equal savings.

The Gerstley Letter

In Paragraph 81-B of the complaint on file herein, and which paragraph is one of the amendments made to said complaint, it is charge that said defendants, or some of them, fraudulently caused their books and records to be changed, altered, destroyed or substituted in an endeavor to prevent the true facts, situations and purposes of defendants in the carrying on of such conspiracies and combinations charged in said complaint from being known or disclosed to plaintiff or other parties and in order to give a false and incorrect statement of their affairs, conditions, activities and purposes.

Such allegation is fully supported by the letter from J. M. Gerstley, Assistant General Manager of Pacific Coast Borax Company and the Borax Consolidated Group, dated July 8, 1937 to William Gauge, a San Francisco exporter, and which letter appears in the criminal proceedings against said defendants, or certain of them, formerly pending in this Court and numbered 28900-S; said letter constitutes Exhibit "A," attached to Document No. 75 of the records of said criminal proceeding now on file with the Clerk of the above entitled Court; said letter reads in part as follows:

I am returning these letters to you as I don't want them on our files. I think and so does F. M. J., that our letters to each other should not refer to agreements—gentlemen's or otherwise—other than Western contract, unless in notes like this, and I suggest you "lose" your file copies of the attached letter." (Emphasis supplied.) [136]

Affiant respectfully submits that both he and plaintiff did everything possible, during the period hereinabove set forth, to secure proof of the possibility as to the violations by defendants, or some of them, of the Anti-Trust Laws in their borax business, and in this connection alleges that neither the Department of Justice nor the Department of the Interior of the United States Government were able even with their able and large investigating facilities to discover proof of such violations of the Anti-Trust Laws by defendants, or some of them, until the agents of the Department of Justice secured access to the books and effects of the American Potash & Chemical Corporation in 1942, after they had been sized by the Alien Property Custodian of the United States, subsequent to the Declaration of War between the United States and Germany. Affiant used every endeavor possible and pursued every line of investigation within his power to confirm the possibility of such Anti-trust violations but was unsuccessful in his said efforts, largely but not wholly, by reason of the said statements made to him by officials of the said Department of Justice as well as officials of said Department of the Interior, all of which statements affiant believed and now believes to have been made to him in good faith and constituting the truth when so made to him by said officials. Due to the fact that those controlling the interests of defendants, or most of them, were foreign citizens, and that the secret and confidential records of said defendants, or most of them were kept in their head offices in

foreign lands, defendants were able to conceal their activities and violations of the Anti-Trust Laws.

By reason of the foregoing, affiant respectfully submits that said Motions for Summary Judgment and for Dismissal should be denied. [137]

GEORGE B. BURNHAM

Subscribed and sworn to before me this 19th day of February, 1946.

[Seal] LAURA E. HUGHES,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires March 3, 1948.

[Endorsed]: Filed Feb. 26, 1947.

[Title of District Court and Cause.]

REPLY AFFIDAVIT OF MOSES LASKY IN
SUPPORT OF DEFENDANTS' MOTIONS
TO DISMISS AND FOR A SUMMARY
JUDGMENT.

State of California,
City and County of San Francisco—ss.

Moses Lasky, being first duly sworn, deposes and says:

That he is one of the attorneys for defendants Pacific Coast Borax Company, United States Borax Company and Borax Consolidated, Ltd.

On Monday, March 4, 1946, this Court granted "Defendants' [139] Motion for Documents under Rule 34 in Connection with Motions to Dismiss and

for Summary Judgment.” Immediately thereafter affiant was shown certain documents by George B. Burnham, and said Burnham gave to the affiant copies thereof.

For the purpose of bringing the whole of said document before the Court pursuant to Rule 56(e) of the Rules of Civil Procedure, affiant attaches hereto true photostats of the following copies given by George B. Burnham to the affiant as aforesaid:

1. As Exhibit A, letter from B. D. Townsend, attorney for Burnham Chemical Company, to Mr. H. Stanley Hinrichs, c/o Bright, Thompson & Hinrichs, Southern Building, Washington, D. C., dated July 26, 1928.

2. As Exhibit B, letter dated November 13, 1928 from B. D. Townsend, on the letterhead of Francis J. Heney, to Mr. G. B. Burnham.

3. As Exhibit C, memorandum entitled “Application of Federal Trade Commission to Borax Conditions,” being one of the memoranda prepared by B. D. Townsend and sent to B. G. Burnham with the above letter of November 13, 1928.

4. As Exhibit D, letter from Judge Francis J. Heney to G. B. Burnham dated August 3, 1934.

5. As Exhibit E, letter dated August 3, 1934 from Francis J. Heney to Louis Glavis, Bureau of Investigation, Interior Department, Washington, D. C.

6. As Exhibit F, printed letter of George B. Burnham as President of the Burnham Chemical Company to “Dear Stockholder,” dated September 3, 1937, being a [140] circular letter to stockholders of the plaintiff company.

7. As Exhibit G, letter of November 22, 1939, from George B. Burnham to Mr. Thurman W. Arnold, Assistant Attorney General, Department of Justice, Washington, D. C.

8. As Exhibit H, mimeographed copy of letter from George B. Burnham to Secretary of the Interior, Washington, D. C., dated November 18, 1939.

9. As Exhibit I, letter dated January 30, 1940, from G. B. Burnham, President of the Burnham Chemical Company, to Mr. Morris Clark, United States Department of Justice, Room 422, Post Office Building, 7th and Market Street, San Francisco, California.

The passages in the foregoing letters and documents to which defendants wish to call particular attention are the following:

1. In the letter of November 13, 1928, from B. D. Townsend to Mr. George B. Burnham:

“Herewith I also hand you a memorandum concerning the ‘Application of Federal Trade Commission Laws to Borax Trade Conditions.’ In this document, I have merely given my ultimate conclusions, * * *

“The conclusion which I have expressed in the latter memorandum is supported by a very extensive study which I have given the subject during the past two weeks. I am now convinced that proceedings before the Federal Trade Commission would result in substantial benefits to those interested in the subject.”

2. In the memorandum entitled “Application of Federal Trade Commission Laws to Borax Trade Conditions”: [141]

“For about three years, and particularly during the past year, a persistent price-war has been waged in the Borax Trade, until the price has been reduced to a point below actual cost of production, if all of the actual elements of production-cost are included in the computation, and the methods of computation are otherwise correct.

“This situation imperils the continued existence of competition in the Borax Trade, and will ultimately lead to the establishment of an absolute trust, if the causes of the situation are not terminated.

“Various excuses and explanations are offered by those responsible for this situation, but it is quite evident that these excuses and explanations are more cloaks and disguises, and that an adequate investigation of the subject will develop proof that this situation is the natural and inevitable result, and therefore the very object and purpose, of trade practices which are in violation of the Federal Trade Commission Act, also the Federal Anti-Trust Laws.

“These unlawful practices may be concealed by clever theories and ingenious accounting devices, but when the true facts are disclosed, the very cleverness and ingenuity employed to cloak and disguise the true facts, will become added and persuasive proof of consciousness of an illegal purpose.

* * * * *

“In the event that the investigation results in the filing of charges by the Commission, any interested party, whose interest will be [142] affected by the result of the hearing, will be permitted to intervene.”

3. Letter of August 3, 1934, from Francis J. Heney to Louis Glavis:

“This will introduce my friend and former client, George B. Burnham, who desires to talk with you about a matter which I think it is well worth your while to investigate, to wit, the matter of the Pacific Coast Borax Company having established, continued and maintained an evil and strangling monopoly in the borax business.”

4. In the letter of November 22, 1939 from G. B. Burnham to Mr. Thurman W. Arnold:

“The American Potash & Chemical Corporation and the Pacific Coast Borax Co. are both English owned companies, and the two together constitute the British Borax Trust. * * *

“However, the very month the Burnham Chemical Co. started production of borax, in June, 1928, a drastic cut in the price of borax occurred, with the result that, in a few months, we were forced out of business. From outward appearances, it appeared that the price war on borax was between the two big English producers—namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Co. The fact that the main price cutting in the price war started the month we began production convinces us that it was aimed purposely to destroy us. At least that was the resulting effect of the price war.

“We took the matter up with our attorneys, [143] Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Anti-Trust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

“As time goes on, more evidence has been gathered to show that the two British-owned borax and potash producers in this country are building up a monopoly to drive out all American competition. And so, since you are making an investigation of the fertilizer industries, I am bringing our situation to your attention at this time.

“Enclosed you will find a copy of a letter written by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.”

5. In the letter of September 3, 1937, from the Burnham Chemical Company to its stockholders:

“When we finally got the borax unit of our plant built in 1928 (by having money sent to us by express) the acquisition of the borax deposits at Kramer, California, by the foreign owned borax interests together with the increased production made by foreign owned interests at Searles Lake, enabled both these foreign owned interests to make such drastic cuts in the price of [144] borax that

we could make no profit. The borax trust started its drastic cut in prices the very month we started production. * * *

“These low prices (in 1930) were the result of the still greater increased production by foreign owned interests at Searles Lake and the acquisition by foreign owned interests of the Kramer Borax deposits.”

6. In the letter of George B. Burnham to the Secretary of the Interior, November 18, 1939, on page 4:

“But the very month our production started, in June, 1928, the American Potash & Chemical Corporation and the Pacific Coast Borax Co., both foreign owned companies, began cutting the price of borax from approximately \$60.00 per ton f.o.b. Searles Lake to about \$18.00 a ton. Our cost of production was \$26.00 per ton, so, when the price fell below \$26.00 we were losing money—and we had to close down our plant. After we stopped our small production the price went up. * * *

“It is evident that the foreign-owned borax interests realized that if the solar methods of production got an adequate start they could become serious competitors to themselves; it would break the British monopoly of the potash and borax industry in this country; and so this drastic cut in the price of borax was aimed at us, to drive cheaper methods of production from the field. The new source of borax in [145] the Kramer Borax fields was the excuse of the Borax Trust for cutting the price of borax, but that field had been in production for a

year before we started production. Furthermore, after we stopped our small production, the price went up.”

On page 5 of the same letter:

“Stephen T. Mather was, at one time, Chicago Manager of the Pacific Coast Borax Co. and was Assistant to the Secretary of the Interior from 1915 to 1917, and was a Director of the National Parks Service of the Department of the Interior from May 16, 1917, up until the time of his death, about 1930. (See Who's Who in America, 1926.) While he held this high government position, he was also Vice-President of the Sterling Borax Co., which is a subsidiary of the Pacific Coast Borax Co., a foreign-owned enterprise. Stephen T. Mather admits that he was in a measure responsible for the Post Office Fraud Order being issued against the Burnham Chemical Company, in a letter dated October 8, 1926, written to Clarence Whitney, one of the Directors of the Burnham Chemical Co. A copy of his letter is enclosed. * * *

“Mr. Mather himself admits the process may be all right and the foreign-owned Borax Trust itself endorses the process. And so they were afraid we would be a formidable competitor, and Mr. Mather influenced the Post Office to issue a Fraud Order so we would not raise funds. Mr. Mather was a high government official and also an officer and stockholder in the British-owned Borax Trust.”

7. In the letter of January 30, 1940, from George B. Burnham, President of the Burnham

Chemical Company, to Mr. Morris Clark of the Department of Justice, referring to the price cuts of 1928, he states, and the underscoring is his:

“That was the very month we started our borax production, June, 1928. We continued our production until January 1929 and we were then forced to shut down due to price cutting. From stocks of borax on hand we continued to sell borax until the fall of 1929. During this period the price of borax continued to fall still more. * * *

“By the fall of 1929 all the borax stored in our warehouse was sold * * *

“As long as we threatened renewal of our production or had stocks of borax on hand, the price stayed down, but when all our borax was sold and we were eliminated as a competitor, the price went up. * * *

“However, the long duration of the depression and the cheaper source of borax in the new Kramer Borax Field has kept the price down so that it has never yet returned to its former price level that existed prior to June, 1928.” [147]

MOSES LASKY.

Subscribed and sworn before me this 6th day of March, 1946.

EUGENE P. JONES,

Notary Public in and for the City and County of San Francisco, State of California.

(Admission of Service).

(Attached to the foregoing document are the following Exhibits, to wit):

Ex. A, identical with Defts' Ex. J. introduced at trial. Ex. B, identical with Defts' Ex. K. introduced at trial. Ex. C, identical with Defts' Ex. L introduced at trial. Ex. D, identical with Defts' Ex R introduced at trial. Ex. E, identical with Defts' Ex. S introduced at trial. Ex. G, identical with Defts' Ex. A introduced at trial. Ex. H, identical with Defts' Ex. H introduced at trial. Ex. I, identical with Defts' Ex. Z introduced at trial. [148]

EXHIBIT "F"

George B. Burnham, 214 E. C. Lyon Building,
Reno, Nevada.

September 3, 1937.

Dear Stockholder:

A crisis has been reached in the affairs of your company in which it is absolutely necessary to pay the rent on our potash lease at Searles Lake, California, or the Government will cancel the lease. We now owe the Government five year's rent amounting to \$11,400. Things look dark, yet there is light on the horizon that may lead to some kind of Government aid if you assist us.

In my personal letter to you of March 2, 1936, I advised all the stockholders that the Government had brought suit to cancel our lease and that we should have \$10,000 immediately to pay the rent

and take care of other necessary expense. That appeal brought in only \$316.00. Since then we have been successful in delaying the suit. In fact for a while we thought we could make other arrangements to pay the rent, but now on September 13, 1937, the suit must come up for trial and since we are now five years in default we will surely lose the lease and our investment of \$1,500,000 unless the rent is paid.

The reasons why the rent has not been paid and we could not even develop our lease during the last five years, are as follows:

1. The Post Office Fraud Order of June, 1925 prevented us from raising adequate funds when business conditions were good.

2. When we finally got the borax unit of our plant built in 1928, (by having money sent to us by express) the acquisition of the borax deposits at Kramer, California, by the foreign owned borax interests together with the increased production made by foreign owned interests at Searles Lake, enabled both these foreign owned interests to make such drastic cuts in the price of borax that we could make no profit. The borax trust started its drastic cut in prices the very [149] month we started production. We were not equipped to make other chemicals like the foreign owned interests at Searles Lake, and so we had to shut down.

3. Finally when the United States Court handed down a decision in February, 1930 in our favor, forbidding the enforcement of the Fraud Order be-

cause there was no evidence of Fraud before the Post Master General, this country was entering upon a great depression making it impossible to raise money to build a multi-product plant large enough to compete with the low prices prevailing. These low prices were the result of the still greater increased production by foreign owned interests at Searles Lake and the acquisition by foreign owned interests of the Kramer Borax deposits. . .

Since then we have been seeking capital in various ways. We may yet raise enough money directly or indirectly to build a plant large enough to operate profitably, a plant that will successfully compete with the growing foreign owned neighbor at Searles Lake, who has already produced over \$40,000,000 worth of chemicals from the Searles Lake Potash Reserve and who is continually increasing his production. It is reported that earnings for 1936 were \$2,053,905, out of which they paid \$1,188,877 in dividends. Some of you are familiar with certain other efforts being made to raise capital.

However, I feel that the time has come when the Government itself should provide some form of relief or assistance in order that we can get into profitable production quickly. The United States Senate has appointed a committee to investigate the Potash industry, and we have been asked to submit any material which we may deem important in this investigation. Besides submitting a formal statement in writing, I recently called upon Senator Key Pittman of Nevada, Chairman of this Committee, and discussed the conditions of the industry and

your company in detail. I also called on other Government officials. In these discussions I pointed out that our company is particularly entitled to consideration because of the damage done to it and the stockholders in the issuing of a Post Office Fraud Order when there was no fraud. [150]

At a meeting of the Philadelphia Stockholders held in Philadelphia on June 17, 1937, resolutions were passed requesting the Government for a subsidy of \$5,000,000 for the Burnham Chemical Company and other compensation in view of the disadvantages which the company has suffered through Government action. A copy of the resolutions were sent by the Philadelphia stockholders to the President of the United States, Secretary of the Interior and certain members of Congress. A copy is enclosed for your information.

The resolutions and preamble point out how unfair it is for the Government to permit a foreign owned company to own its potash deposit at Searles Lake, California, and permit them to recover all the valuable chemicals they want without paying any royalty to the Government and then place an unjust barrier in the form of a Fraud Order upon us Americans when we were trying to develop the property and pay the Government a royalty.

How unfair of our Government to grant them ownership of these lands and also grant ownership to sodium borate deposits at Kramer, California, but demand that we Americans lease our lands and pay rents and royalties, and if we can't pay we lose

our lease, even though all these acts were in accordance with the law as viewed by the Department of the Interior at that time.

The resolutions further point out that now that the Government has granted ownership to the center of the Searles Lake Potash Reserve to a foreign owned company has passed the outright ownership to the largest sodium borate deposit in the world at Kramer, California, to another foreign owned interest, that now, the stockholders of the Burnham Chemical Company should demand, through proper legislative acts of Congress, a \$5,000,000 subsidy for the Burnham Chemical Company.

Such a subsidy or outright gift, would be used to enable the Company to get into profitable production, and we would be partially compensated for the irreparable damages done to the company by the stigma of the Post Office Fraud Order and the losses and discouragements thereby sustained by its 7000 American Citizen stockholders. [151]

The directors of your company commend these acts of loyalty of the Philadelphia stockholders and we wish to express our gratitude to Mr. Frank B. Stockley, Chairman of the Philadelphia Stockholders Committee, who is leading the Philadelphia stockholders in their fight for justice through Congressional legislation, and all others who are assisting in this work.

Now that the fight for justice has been started it should be carried on to a successful conclusion. It will require money to carry on the fight. The payment of the rent on the lease does not do us any

good unless we have money to develop the lease. I am therefore asking you first for a contribution in order to have funds to carry on this fight for a \$5,000,000 subsidy so ably started by the Philadelphia stockholders, and to seek private capital. We have three financially responsible parties who are considering financing us, but it takes time and money to carry on negotiations. Funds should also be provided to pay the rent on the lease before September 13, 1937, for the payment of the rent holds our lease and gives us more time to raise the money to develop it. The fight for the \$5,000,000 subsidy should be carried on with vigor for it is only just that we should have it.

Why should foreign owned interests have ownership to valuable potash deposits in the Searles Lake Potash Reserve and we Americans who have spent \$1,500,000 in our endeavor to develop these Government deposits have our lease and investment taken away from us through no fault of ours?

Why should foreign owned interests be granted ownership to the largest sodium borate deposit in the world at Kramer, California, and yet we Americans, who have continually fought for these deposits on behalf of the government, are having a hard time in getting a lease on even 10 acres of the apparently known sodium borate deposits in this great Kramer borax field? America for Americans is our motto. No doubt the Department of the Interior have acted in accordance with the law as they viewed it at that time, but why should foreign owned interests get all the benefits?

Stockholders of the [152] Burnham Chemical Company! It is time that we rise up in defense of our interests! Enough damage was done to you when the Fraud Order was issued against your company. There is no need of adding further suffering by taking away our lease and borax plant. It is now time that we have some compensation for all the damage done to our company. A \$5,000,000 subsidy from the Government is a modest request after all, when all things are considered, and, I believe there is a possibility of getting it if you will contribute such funds as you can to this fight for justice.

Whether or not this subsidy is granted, or any direct financial assistance is given by the government, I expect that as a result of the work of the Potash Investigation Committee, some form of legislation will be enacted or something will be done to encourage the development of Government leases. If this is done we should be able to make some arrangement for the development of our property. In any event if the rental is paid it should afford us time and opportunity to work out arrangements for development by private capital. By all means we want to pay our lease rental and thus keep our lease in good standing.

Some of you may be able to contribute \$100 or \$500 in this worthy cause, others may only be able to contribute \$5 to \$50, but make the amount of your contribution as great as possible. You can pay it in installments if you wish. Through your contribution you help us gain recognition in Congress that might result in a \$5,000,000 victory.

Our stock is non-assessable and we cannot levy assessments. There is no penalty we can levy if you do not contribute, but there is the almost certain penalty of losing your entire investment and losing a glorious fight for Justice, if you do not contribute.

So make your contributions on the enclosed blank as much as you can and as quickly as you can. If not enough money is received to pay the rent then the funds that are received will be used to carry on our fight for financial aid through Congress. But we should have enough money to do both. So make your contributions large.

Mail your contribution now so we can pay our rent before September 13, 1937.

A contribution from everybody should save our lease, give us time [153] for further financing and may bring us a \$5,000,000 atonement for damages.

Faithfully yours,

G. B. BURNHAM,

President, Burnham Chemical
Company.

Please advise us of any change of address.

.. .. .
Contribution Fund for Justice
.....1937

G. B. Burnham,
Box 811, Reno, Nevada.

I hereby contribute \$. for your fight for justice on behalf of the stockholders of the Burnham Chemical Company.

Enclosed find my remittance of \$. as full payment/as part payment. I will pay the balance as follows:

You may use this money in any way you think best to carry on your fight, which in your judgment may be for the best interest of the Burnham Chemical Company stockholders.

.

(The foregoing Exhibit "F" is attached to Reply Affidavit of Moses Lasky in Support of Defendants' Motions to Dismiss and for a Summary Judgment.)

[Endorsed]: Filed March 6, 1946.

[Title of District Court and Cause]

SUPPLEMENTAL AFFIDAVIT OF GEORGE B. BURNHAM

United States of America,
 Northern District of California,
 City and County of San Francisco—ss.

George B. Burnham, being first duly sworn, deposes and says:

That he is now and at all times herein set forth has been President of Burnham Chemical Company, the plaintiff above named:

That he has read the affidavits of Moses E. Lasky

dated March 6, 1946 to which are attached photostatic copies of letters written by affiant and the attorneys for plaintiff herein.

That in November, 1928, Mr. Francis J. Heney and Mr. B. D. Townsend, attorneys for plaintiff were of the opinion that a price-war was being waged in the borax trade in violation of the anti-trust laws and they felt that Burnham Chemical Company had a case against its competitors under the anti-trust laws, if evidence could be gathered to prove such violation and such statement was what affiant referred to in his letter to Thurman W. Arnold, dated November 22, 1939 and set forth in part in the said affidavit of Mr. Moses Lasky, page (5) thereof, and sworn to on March 6, 1946.

Affiant and Mr. Townsend, at plaintiff's expense, endeavored to obtain such evidence and even went to Washington, D. C. in the Spring of 1929 and conferred with Government officials there and especially with officials in the Department of Justice and Federal Trade Commission [155] in an endeavor to obtain evidence to support such a charge and we also went to New York City to obtain evidence but in all such efforts we were unsuccessful.

Although plaintiff was unable to employ Mr. Townsend or Mr. Heney, to continue their investigation and search for such evidence after 1929, nevertheless, affiant continued his investigation independently with occasional conferences with Mr. Townsend from time to time thereafter.

At one of these conferences on October 11, 1934, Mr. Townsend recommended to affiant that affiant investigate to see if there was not some single company that controlled both defendant American Potash and Chemical Corporation and defendant Borax Consolidated Ltd., such as the Goldfields Consolidated of South Africa. He believed that maybe there was some published report on it and if affiant could find such a report, or some proof of common control, it would be substantial evidence to support a charge of violating the law. Affiant was never able to find any such report that the Goldfields Consolidated of South Africa controlled said defendants or any other evidence that would support a charge, until the fall of 1944 when the Government brought its suit against said defendants under the Sherman Anti-Trust Act.

GEORGE B. BURNHAM.

Subscribed and sworn to before me this 8th day of March, 1946.

[Seal]

LAURA E. HUGHES,
Notary Public in and for the City and County of
San Francisco, State of California.

My Commission Expires March 4, 1950.

[Endorsed): Filed March 11, 1946. [156]

In the Southern Division of the United States District Court for the Northern District of California

No. 24948-G

BURNHAM CHEMICAL COMPANY,
a Corporation,

Plaintiff,

vs.

BORAX CONSOLIDATED, LTD., et al.,
Defendants.

MEMORANDUM DECISION

On Motions to Dismiss, for Summary Judgment,
and to Quash for Lack of Venue

The motion for summary judgment in favor of defendants may be granted only if “* * * except as to the amount of damages, no genuine issue as to any material fact” justifies judgment as a matter of law. Rule 56(c) Rules of Civil Procedure. *Detsch & Co. v. Amer. Products Co.* 9 Cir. 152 Fed. 2d 473. The burden of negating existence of a genuine issue of fact is upon movant and any doubt must be resolved against him. *Walling v. Fairmount Creamery Co.* 6 Cir. 139 Fed. 2d 318.

It is urged as a basis for the motion for summary [157] judgment that the cause is barred by the statute of limitations. This is a proper ground of motion. *U. S. etc. v. Fleisher*, 45 Fed. Supp. 781; *Reynolds v. Needles*, *infra*. Affidavits in support of the motion set out proceedings in the District Court

of the United States for the District of Nevada, over fifteen years prior to the filing of this action, wherein the present plaintiff there made, under oath, allegations indicating knowledge at that time of the conspiracy made the basis for this action for damages under the Anti-Trust Act. (15 USCA 15). Plaintiff denies the existence of knowledge then and alleges fraudulent concealment of the alleged conspiracy by defendants until its discovery shortly prior to the filing of this action.

While it would appear from the record here, that plaintiff may have great difficulty in producing credible evidence to defeat the defense of limitations, the Court would not, upon that basis, be justified in granting the motion. *Griffin v. William Penn Broadcasting Co.* 4 F.R.D. 475; *Whitaker v. Coleman*, 5 Cir. 115 Fed. 2d 305. The court under such circumstances must be convinced that such evidence is "in its nature too incredible to be accepted by reasonable minds or that conceding its truth, it is without legal probative force." *Whitaker v. Coleman*, *supra*.

In this circuit, the Court of Appeals appears to look with disfavor upon motions for summary judgment, unless as in the case of *Gifford v. Travellers Protective Assoc.*, 9 Cir. 153 Fed. 2d 209, there is no evidence of any kind tendered in opposition to the motion, and the evidence in support thereof is factually indisputable and legally conclusive. *Id.* *Reynolds v. Needles D. C.* 132 Fed. 2d 161; *McGrath v. Helene Rubenstein*, 29 Fed. Supp. 822. See *Detsch & Co. v. Amer. Products Co.* *supra*. [158]

The admonition of our Circuit Court of Appeals causes me to deny the motion for summary judgment.

The issue of the statute of limitations, however, should be resolved preliminarily upon a separate trial. Rule 42 (b) Rules of Civil Procedure.

I am of the opinion that the interests of justice and of the parties will best be served if this issue is determined before litigating the larger issues involved in the merits of the controversy. *Canister Co. v. National Can Corp.* 3 F.R.D. 279; *Clark v. Lowden*, 48 Fed. Supp. 261, 266; *Berghane v. Radio Corp. of America* 4 F.R.D. 446.

Defendants may file within 10 days a special answer setting up the defense of the statute of limitations. Thereupon either side may move the court to set the special issue for trial. The time of defendants to answer on the merits is extended to a date 10 days after the determination of the special issue, if the same is decided adversely to them.

Decision on the motions to dismiss and strike is reserved until the special issue is decided. Rule 12 (d) Rules of Civil Procedure.

The motion of defendant United States Borax Company to quash summons and to dismiss for improper venue is denied. *Mississippi Publishing Corp. v. Murphree* U. S. Supreme Court No. 234 Oct. term 1945, 66 S. Ct. 242. Dated: September 20, 1946.

LOUIS P. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 20, 1946. [159]

[Title of District Court and Cause.]

SPECIAL ANSWER OF AMERICAN POTASH
& CHEMICAL CORPORATION TO PLAINTIFF'S COMPLAINT AS AMENDED

Comes now the defendant, American Potash & Chemical Corporation, and in compliance with the order of this court dated September 20, 1946, filed this its special answer, limited to the defense of the Statute of Limitations only, to the plaintiff's complaint as amended, and hereby expressly reserves the right to hereafter file a general answer, alleging, stating and denying as follows:

1. That the cause of action set forth in the plaintiff's complaint as amended alleges that the defendants committed certain alleged wrongful acts in a period prior to 1929 which resulted in injury and damage to the plaintiff in January of 1929; that said cause of action, either as pleaded or otherwise, did not accrue within three years next before the commencement of this action, and did not accrue within three years next before September 14, 1944, and did not accrue within three years next before October 10, 1942, but accrued, if at all, more than three years prior to all of said dates; that by reason thereof, the cause of action stated in the plaintiff's complaint as amended is barred by the Statute of Limitations and by the provisions of Subdivision (1) of Section 338 of the California Code of Civil Procedure and Subdivision (4) of Section 338 of the California Code of Civil Procedure.

2. Said defendant alleges further that the alleged cause of action is barred by the provisions of each and all of the following:

(a) California Code of Civil Procedure, Section 338, Subdivision (2); [160]

(b) California Code of Civil Procedure, Section 338, Subdivision (3);

(c) California Code of Civil Procedure, Section 340, Subdivision (1);

(d) The statute of limitations.

3. In answer to the averments contained in paragraph numbered 75 of plaintiff's complaint as amended, this answering defendant, being without knowledge or information sufficient to form a belief as to the truth thereof, denies said averments and demands strict proof thereof.

4. In answer to the averments contained in paragraph numbered 81-A of plaintiff's complaint as amended, this answering defendant denies that the plaintiff had no knowledge either of the alleged conspiracies and combinations set forth, or of the alleged intent or purposes of the defendants in the performance of the acts set forth, until on or about September 14, 1944; and defendant denies both that plaintiff had no knowledge prior to September 14, 1944, and that plaintiff had no opportunity to secure such knowledge, of the acts, things and proceedings alleged to have been had and engaged in by said defendants, and of the alleged fraudulent and illegal formation of a conspiracy, and of prior agree-

ments alleged to have led thereto, and of alleged subsequent agreements with respect thereto; and defendant denies that the alleged acts, or any of them, of this defendant or the other defendants, or of any of them, as described in plaintiff's complaint as amended, or the formation of the conspiracies and combinations, or of any of them, as described in plaintiff's complaint as amended, were fraudulently or otherwise concealed from the plaintiff; and defendant further denies each and every other averment contained in said paragraph numbered 81-A not herein specifically denied. [161]

5. In answer to the averments contained in paragraph numbered 81-B of plaintiff's complaint as amended, this answering defendant states that if the averments, or any of them, therein set forth are or is intended to refer to this answering defendant, this defendant denies each and every averment therein contained, but if the averments or any of them therein contained are or is intended to refer to some other defendant, then this answering defendant, being without knowledge or information sufficient to form a belief as to the truth thereof, denies said averments and each of them and demands strict proof thereof.

6. For further answer, this answering defendant states that the statements alleged to have been made by C. B. Zebriskie of the Pacific Coast Borax Company, all as set forth in paragraph numbered 75 of plaintiff's complaint as amended, if so made, were made without the consent, knowledge, approval

or authority of this answering defendant and were not and are not the statements of this answering defendant, and were not and are not in any wise binding upon or chargeable to this answering defendant.

Wherefore, this answering defendant prays that the court fix a date for a special hearing on the issues herein raised and, upon such hearing, order that the cause of action contained in plaintiff's complaint as amended be dismissed with prejudice and at plaintiff's costs and that this answering defendant recover its costs herein expended.

AMERICAN POTASH &
CHEMICAL CORPORATION

By /s/ OLIVER DONNALLY,
/s/ WILLIAM J. FROELICH,
/s/ CHARLES A. BEARDSLEY,
/s/ PHILIP M. AITKEN,

Its Attorneys.

Received copy of foregoing answer September 30, 1946.

STERLING CARR by W. C.,
Attorney for Plaintiff.

[Endorsed]: Filed Sept. 30, 1946. [163]

[Title of District Court and Cause.]

SPECIAL ANSWER OF DEFENDANTS PACIFIC COAST BORAX COMPANY, BORAX CONSOLIDATED, LTD., AND UNITED STATES BORAX COMPANY TO COMPLAINT, AS AMENDED, SETTING UP DEFENSE OF STATUTE OF LIMITATIONS

Pursuant to the order of this Court made on September 20, 1946, and reserving all rights to plead further to the complaint as amended in the event the issue of the Statute of Limitations presented by this answer is decided adversely to them, the defendants Pacific Coast Borax Company and Borax Consolidated, Ltd., and defendant United States Borax Company without waiving its exception to the court's order overruling its motion to quash purported service of summons and to dismiss action for improper venue, file this, their special answer to the complaint, as amended by "Amendment to Complaint" filed November 29, 1945, to set up the defense of the Statute of Limitations, and to that end these defendants deny and allege, as follows:

I.

These defendants are without knowledge or information sufficient to form a belief as to the truth of the following averments in paragraph 75 of the complaint:

"That in May, 1929, said Burnham called upon C. B. Zabriskie, the manager of defend-

ant Pacific Coast Borax Company, at his office in New York City, and protested against the said cuts made by defendants in the price of Borax and charged said defendants with so doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants; and that at said time said Zabriskie denied the said charges of said Burnham and claimed that such cuts were made solely by reason of the discovery of kernite at the Kramer Borax Fields in Kern County, California, * * * and further stated that defendants had no desire or intention to injure or damage plaintiff.” [164]

Defendants expressly deny each and every one of the remaining allegations of said paragraph 75.

II.

Deny each and every allegation of paragraph 81-A of the complaint, added to the complaint by said “Amendment to Complaint” filed November 29, 1945.

III.

Deny each and every allegation of paragraph 81-B of the complaint, added to the complaint by said “Amendment to Complaint” filed November 29, 1945.

IV.

Allege that the action alleged in the complaint is barred by the provisions of subdivision 1 of Section 338 of the California Code of Civil Procedure.

V.

Allege that the said action is barred by the provisions of subdivision 4 of Section 338 of the California Code of Civil Procedure.

VI.

Allege that the said action is barred by the provisions of subdivision 2 of section 338 of the California Code of Civil Procedure.

VII.

Allege that the said action is barred by the provisions of subdivision 3 of Section 338 of the California Code of Civil Procedure.

VIII.

Allege that said action is barred by the provisions of subdivision 1 of Section 340 of the California Code of Civil Procedure.

IX.

Allege that the right of action set forth in the complaint did not accrue within three years next before the commencement [165] of the action but accrued prior to said three years.

X.

Allege that the right of action set forth in the complaint did not accrue within three years next before September 14, 1944, but accrued more than three years prior to said date.

XI.

Allege that the right of action set forth in the complaint did not accrue within three years next before October 10, 1942, but accrued more than three years prior to said date.

XII.

Allege that the said action is barred by the Statute of Limitations.

Wherefore, defendants pray plaintiff take nothing by its action and that they be hence dismissed with their costs herein incurred.

NEWLIN, HOLLEY,
SANDMEYER & COLEMAN,
/s/ MAURICE E. HARRISON,
/s/ MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,

Attorneys for Defendants Pacific Coast Borax Company, Borax Consolidated, Ltd., and United States Borax Company.

(Receipt of Service.)

[Endorsed]: Filed Sept. 30, 1946. [166]

[Title of District Court and Cause.]

NOTICE OF MOTION TO SET FOR TRIAL
AND DEMAND OF PLAINTIFF FOR
JURY TRIAL ON SPECIAL ISSUE OF
STATUTE OF LIMITATIONS

To the Above-Entitled Court, and to Defendants
Above-Named and to Their Respective Attorneys:

You, and each of you, Will Please Take Notice that Plaintiff above named will, upon the 21st day of October, 1946, move the above-entitled Court to set for trial the special issue of the Statute of Limitations as provided by the Order of this Court, dated September 20, 1946; and you, and each of you, will please further take notice that plaintiff above named hereby demands a trial by jury on the issue of the Statute of Limitations and as provided by said Order of this Court.

Dated: October 8, 1946.

STERLING CARR,
Attorney for Plaintiff.

[Endorsed]: Filed Oct. 9, 1946. [167]

[Title of District Court and Cause.]

PRE-TRIAL ORDER

After hearing and argument, the form of the question to be propounded to the jury upon the special issue of the plea of the Statute of Limitations has been submitted to the Court for determination, It is therefore,

Ordered that the special issue to be submitted to the jury shall be as follows:

“At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust laws of the United States?”

Dated: January 14, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Jan. 16, 1947. [168]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the District Court of the United States for the Northern District of California, Southern Division, held at the Court Room thereof, in the City and County of San Francisco, on Thursday, the 3rd day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

Minute Order of April 3, 1947

ORDER DENYING PLAINTIFF'S MOTION
FOR A DIRECTED VERDICT, ORDER
GRANTING DEFENDANTS' MOTION FOR
A DIRECTED VERDICT

The parties hereto and the jury heretofore impaneled herein being present as heretofore, the further trial of this case was resumed. The Court having taken under advisement the respective motions of the plaintiff and the defendants for a directed verdict in favor of the plaintiff and the defendants, respectively, and due consideration having been had thereon, it is Ordered that plaintiff's motion for a directed verdict be denied and the defendants' motion for a directed verdict be granted.

[Title of District Court and Cause.]

NOTICE OF MOTION FOR DIRECTED VER-
DICT OR IN THE ALTERNATIVE NO-
TICE OF MOTION FOR NEW TRIAL ON
SPECIAL ISSUE AS TO STATUTE OF
LIMITATIONS

To the Above-Entitled Court, and to Defendants
Above Named, and Each of Them, and to Their
Respective Attorneys:

You, and each of you, Will Please Take Notice
That Plaintiff above named will, and does hereby,

1. Pursuant to Rule 50(b), move that the ver-
dict entered herein upon the 3d day of April, 1947,
and upon and at the conclusion of the trial upon the
special issue of the statute of limitations, be set
aside and that the motion by plaintiff for a directed
verdict, together with judgment thereon, be granted,
Or in the Alternative

2. Will move, and does hereby move the above-
entitled Court for a new trial upon the special
issue of the statute of limitations upon the follow-
ing grounds, to wit:

- (1) Irregularity in the proceedings of the Court.
- (2) Orders of the Court by which plaintiff was
prevented from having a fair trial.
- (3) Insufficiency of the evidence to justify the
verdict or the decision of the Court.
- (4) That the verdict or other decision of the
Court is against law.
- (5) Errors in law, occurring at the trial, and
excepted to by plaintiff.

The hearings of the above motions will be had at such time as may be fixed by the Clerk of the above-entitled Court.

Said Motions, and each of them, will be made upon the minutes of the Court. [170]

Dated: April 11, 1947.

STERLING CARR,

Attorney for Plaintiff.

(Receipt of Service.)

[Endorsed]: Filed April 12, 1947. [171]

District Court of the United States, Northern
District of California, Southern Division

At a Stated Term of the Southern Division of the United States District Court for the Northern District of California, held at the Court Room thereof, in the City and County of San Francisco, on Monday, the 21st day of April, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Louis E. Goodman,
District Judge.

[Title of Cause.]

Minute Order of April 21, 1947

ORDER DENYING MOTION FOR DIRECTED
VERDICT FOR PLAINTIFF, AND MO-
TION FOR NEW TRIAL OF SPECIAL
ISSUE

This cause came on regularly this day for hearing of motion for directed verdict for plaintiff; also

for hearing of motion for new trial of special issue. After hearing Sterling Carr, Esq., attorney for plaintiff, and Moses Lasky, Esq., attorney for defendants, it is Ordered that the said motions be and the same are hereby denied. [172]

[Title of District Court and Cause.]

ORDER GRANTING MOTIONS TO DISMISS

For the reasons stated by the Court in directing a verdict upon the factual issues upon which the defense of the Statute of Limitations was based, defendants' motions to dismiss are severally granted and the cause is dismissed with costs to defendants.

Dated: May 5, 1947.

LOUIS E. GOODMAN,

United States District Court.

[Endorsed]: Filed May 6, 1947. [173]

In the District Court of the United States for the
Northern District of California, Southern
Division

Civil Action No. 24948-G

BURNHAM CHEMICAL COMPANY, a Corpo-
ration,

Plaintiff,

vs.

BORAX CONSOLIDATED, LTD., et al.,

Defendants.

JUDGMENT

Issue having been joined on the Statute of Limitations, the factual issues thereon having been tried

and a directed verdict thereon having been entered, plaintiff's motion for a new trial having been denied, and defendants' motions to dismiss having been severally granted,

It Is Hereby Ordered and Adjudged that the cause be, and it is hereby, dismissed, that plaintiff have and recover nothing from defendants or any of them, that defendants Pacific Coast Borax Company, United States Borax Company, and Borax Consolidated, Ltd., have and recover their costs from plaintiff in the sum of \$. to be taxed in the manner provided by law, and that defendant American Potash & Chemical Corporation have and recover its costs from plaintiff in the sum of \$. to be taxed in the manner provided by law.

Dated: May 9th, 1947.

LOUIS E. GOODMAN,

United States District Judge.

Approved as to form as provided in local Rule 5(d).

STERLING CARR,

Attorney for Plaintiff.

[Endorsed]: Filed and entered May 9, 1947.

[Title of District Court and Cause.]

NOTICE OF APPEAL FROM ORDER DIRECT-
ING VERDICT IN FAVOR OF APPEL-
LEES AND FROM ORDER DENYING A
DIRECTED VERDICT IN FAVOR OF AP-
PELLANT AND FROM ORDER DENYING
NEW TRIAL

To the Above-Entitled Court and to the Clerk
Thereof, and to defendants Borax Consolidated,
Ltd., Pacific Coast Borax Company, United
States Borax Company, and American Potash
& Chemical Corporation:

Notice Is Hereby Given that Burnham Chem-
ical [175] Company, a corporation, plaintiff above
named, hereby appeals to the United States Cir-
cuit Court of Appeals for the Ninth Circuit from
the order made and entered on April 3, 1947, di-
recting a verdict in favor of defendants Borax Con-
solidated, Ltd., Pacific Coast Borax Company,
United States Borax Company and American Pot-
ash & Chemical Corporation, and further from the
order made and entered on said April 3, 1947, deny-
ing motion of plaintiff for a directed verdict against
said defendants, and from the order made and en-
tered upon the 21st day of April, 1947, denying the
motion of plaintiff for a new trial upon the special
issue of the Statute of Limitations.

Dated: July 1, 1947.

STERLING CARR,
Attorney for Plaintiff.

The names and addresses of the attorneys for said appellees are as follows:

Newlin, Holley, Sandmeyer & Coleman, Esqs.,
1020 Edison Building, Los Angeles 13, California;

Maurice E. Harrison, Esq., Moses Lasky,
Esq., Brobeck, Phleger & Harrison, Esqs., 111
Sutter Street, San Francisco 4, California;

Attorneys for Appellees Pacific Coast Borax
Company, Borax Consolidated, Ltd., and
United States Borax Company, and Oliver &
Donnally, 110 E. 42nd Street, New York 17,
New York; William J. Froelich, Continental
Illinois Bank Bldg., Chicago, Illinois; Charles
A. Beardsley, 1516 Central Bank Bldg., Oak-
land 12, California; [176]

Philip M. Aiken, Esq., 402 Woodmen Acci-
dent Building, Lincoln, Nebraska;

Attorneys for Defendant, American Potash &
Chemical Corporation.

Received a copy of the within this 1st day of
July, 1947.

BROBECK, PHLEGER &
HARRISON,
FITZGERALD, ABBOTT &
BEARDSLEY.

[Endorsed]: Filed July 1, 1947. [177]

[Title of District Court and Cause]

DESIGNATION BY APPELLANT OF
CONTENTS OF RECORD ON APPEAL

To the Clerk of the above entitled Court:

Burnham Chemical Company, a corporation, the above named appellant, respectfully requests that the following portions of the record, proceedings and evidence be included and contained in the record on appeal, to-wit:

1. Complaint and amendment thereto of appellant, on file herein;
2. The special answers of appellees Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company and American Potash & Chemical Corporation;
3. Memorandum Decision of said District Court on motions to dismiss, for summary judgment, and to quash for lack of venue, filed herein on the 20th day of September, 1946;
4. Pre-trial Order of the District Court dated January 16, 1947;
5. Orders of the District Court made upon the 3rd day of April, 1947, granting the motion of appellees for a directed verdict and denying the motion of appellant for a directed verdict;
6. Notice of motion of appellant for a new trial on special issue of Statute of Limitations and motion for directed verdict;

7. Order of said District Court denying the motion of appellant for new trial, made upon April 21, 1947;
8. Reporter's transcript of the evidence given and offered on the trial of said cause upon the special issue of the Statute of Limitations;
9. Notice of appeal of appellant herein;
10. Statement of points upon which appellant intends to rely on appeal;
11. This designation of contents of record on appeal.

Dated this 1st day of July, 1947.

STERLING CARR,

Attorney for Appellant.

Received a copy of the within this 1st day of July, 1947.

BROBECK, PHLEGER &

HARRISON,

FITZGERALD, ABBOTT, &

BEARDSLEY.

[Endorsed]: Filed July 1, 1947. [179]

[Title of District Court and Cause]

STATEMENTS OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
APPEAL PURSUANT TO RULE 75D
FEDERAL RULES OF PROCEDURE.

Now comes Burnham Chemical Company, a corporation, the appellant above named, and pursuant

to Rule 75D of the Federal Rules of Civil Procedure, sets forth a statement of the points upon which appellant intends to rely on appeal, as follows:

1. The District Court erred in denying, upon April 3, 1947, appellant's motion for a directed verdict in its favor and against appellees upon the trial of the special issue of the Statute of Limitations;

2. The District Court erred in granting, upon April 3, 1947, the motion of said appellees above named for a directed verdict against appellant and in the making of the order directing such verdict in favor of appellees;

3. The District Court erred in making its pre-trial order upon the 16th day of January, 1947, that the special issue to be submitted to the jury would be as follows:

“At any time from May 17, 1929 to October 10, 1939 did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?”

4. The District Court erred in stating, upon the 27th day of March, 1947, to the jury empaneled for the trial of the special issue of the Statute of Limitations, the following:

“A question was raised preliminarily as to whether or not this suit was brought within the time specified by law. That is a legal question for the court to determine. However, in

order to aid the court in the determination of that question, the court made an order that a certain question of fact should be determined by the jury. The order that the court made was that the following issue was to be submitted to the jury, and I am quoting now from the court's order:

“ ‘At any time from May 17, 1929, to October 10, 1939, did the plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?’ ”

5. The District Court erred in stating to said jury at said time and place that the issue to be submitted to said jury was: [181]

“At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?”

6. The District Court erred in instructing, as aforesaid, the said jury above referred to and at the time and place hereinabove referred to, at the commencement of the trial of said action and before the introduction of any evidence therein;

7. The District Court erred in taking the said case from the jury and not allowing said jury to pass on the question as given to it at the commencement of said trial by said court, as above set forth;

8. The District Court erred in not submitting the case to said jury;

9. The District Court erred in refusing the request of the attorney for said appellant to read to the jury on the trial of said action the complaint of appellant, and amendment thereto, on file herein;

10. The District Court erred in sustaining the objection of appellees to the introduction by appellant of the evidence offered by or through the witness William Arthur Gauge;

11. The District Court erred in denying, upon April 21, 1947, the motion of appellant herein for a new trial upon the special issue of the Statute of Limitations.

Dated the 1st day of July, 1947.

STERLING CARR,

Attorney for Appellant.

(Acknowledgment of Receipt of Copy)

[Endorsed]: Filed July 1, 1947. [182]

[Title of District Court and Cause]

COUNTER-DESIGNATION BY APPELLEES
BORAX CONSOLIDATED, LTD., PACIFIC
COAST BORAX COMPANY, UNITED
STATES BORAX COMPANY, AND AMER-
ICAN POTASH & CHEMICAL CORPORA-
TION OF CONTENTS OF RECORD ON
APPEAL PURSUANT TO RULE 75 OF
THE RULES OF CIVIL PROCEDURE

The appellees, Borax Consolidated, Ltd., Pacific
Coast Borax Company, United States Borax Com-

pany, and American Potash and Chemical Corporation, each acting for itself, hereby designate the following portions of the record, proceedings and evidence, in addition to those designated by the appellant, to be contained in the record on appeal in this action, taken by appellant on July 1, 1947:

1. The "Motion of defendant Pacific Coast Borax Company to dismiss for failure to state a claim on which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, and to strike," filed herein on or about October 29, 1945.

2. "Motions of defendant United States Borax Company to quash service of summons and to dismiss for improper venue and for lack of jurisdiction over the person of defendant, to dismiss for failure to state a claim upon which relief may be granted, to dismiss because the action is barred by the Statute of Limitations and to strike," filed herein on or about October 29, 1945.

3. "Affidavit of Moses Lasky in support of motions to dismiss filed by United States Borax Company and defendant Pacific Coast Borax Company," filed herein on or about October 29, 1945, including all the exhibits annexed to said affidavit; provided, however, that in order to avoid duplication pursuant to Rule 75(e) of the Rules of Civil Procedure, Exhibit 1 attached to said affidavit may be omitted upon the insertion of a statement in the record that said exhibit is identical with Defendants' Exhibit C introduced at the trial of the special issue; Exhibit 3 attached to said affidavit may [183]

be omitted upon the insertion of a statement in the record that it is identical with Defendants' Exhibit P introduced at the said trial.

4. "American Potash & Chemical Corporation's amended motions to dismiss the action and to strike parts of the complaint," filed herein on or about November 27, 1945.

5. "Notice of motions of defendant Borax Consolidated, Ltd., to dismiss for failure to state a claim on which relief may be granted, to dismiss because the action is barred by the Statute of Limitations, and to strike," filed herein on November 23, 1945.

6. "Stipulations re motions of defendants," filed herein on December 4, 1945.

7. "Further Affidavit of Moses Lasky in support of defendants' motions to dismiss and for a summary judgment," filed herein on January 29, 1946, including the exhibits attached to said affidavit; provided, however, that in order to avoid duplication Exhibit A attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit U introduced at the trial of the special issue; Exhibit B attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit V introduced at said trial.

8. "Affidavit of Philip M. Aitken in support of amended motions to dismiss filed by American Potash & Chemical Corporation and motion for summary judgment," filed herein on or about February 7, 1946, including the exhibits attached to said

affidavit; provided that said exhibits may be omitted upon insertion in the record of a statement that Exhibit 1 thereto is identical with Defendants' Exhibit M introduced in evidence at the trial of the special issue, that Exhibit 2 thereto is identical with Defendants' Exhibit N introduced in evidence at said trial and that Exhibit 3 thereto is identical with Defendants' Exhibit AF introduced at said trial.

9. "Stipulation," filed on or about January 15, 1946 [184]

10. "Affidavit of George B. Burnham on behalf of plaintiff and in reply to affidavits filed by defendants in support of their motions for summary judgment and to dismiss and to strike out," filed herein about February 20, 1946.

11. "Affidavit of F. M. Jenifer in support of defendants' motions to dismiss and for a summary judgment," filed herein on January 29, 1946.

12. "Reply Affidavit of Moses Lasky in support of defendants' motions to dismiss and for a summary judgment," filed herein on March 6, 1946, including the exhibits attached to said affidavit; provided, however, that in order to avoid duplication Exhibit A attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit J introduced at the trial of said special issue; Exhibit B attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit K introduced at said trial; Exhibit C attached to said affidavit may be omitted upon insertion of a statement in the

record that it is identical with Defendants' Exhibit L introduced at said trial; Exhibit D attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit R introduced at the trial; Exhibit E attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit S introduced at the said trial; Exhibit G attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit A introduced at said trial; Exhibit H attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit H introduced at said trial; Exhibit I attached to said affidavit may be omitted upon insertion of a statement in the record that it is identical with Defendants' Exhibit Z introduced at said trial.

13. "Supplemental Affidavit of George B. Burnham," filed herein about March 9, 1946. [185]

14. Plaintiff's "Notice of motion to set for trial and demand of plaintiff for jury trial on special issue of statute of limitations," filed herein about October 8, 1946.

15. Reporter's transcript of proceedings at pre-trial conference on December 2, 1946, and January 16, 1947.

16. Reporter's transcript of argument of plaintiff's counsel on motion to dismiss on December 5, 1945.

17. Reporter's transcript of all proceedings occurring at the trial of the special issue on March

26, 27 and 28, 1947, and April 1, 2 and 3, 1947, if the same is not otherwise included in the transcript prepared pursuant to appellant's designation of "Reporter's Transcript of the Evidence Given and Offered on the Trial" in appellant's designation of contents of record on appeal, including copy of decision of the Department of the Interior January 22, 1947, and copy of decision of the Department of the Interior February 24, 1947, both in the matter of Burnham Chemical Company, Los Angeles 045676, 046681, received in evidence April 3, 1947.

18. This Counter-Designation.

Dated: July 10, 1947.

/s/ MAURICE E. HARRISON,

/s/ MOSES LASKY,

BROBECK, PHLEGER &
HARRISON,

/s/ PAUL SANDMEYER,

NEWLIN, HOLLEY,

SANDMEYER & COLEMAN,

Attorneys for defendants Borax Consolidated, Ltd.,
Pacific Coast Borax Company and United
States Borax Company.

OLIVER & DONNALLY, [186]

/s/ WILLIAM J. FROELICH,

/s/ CHARLES A. BEARDSLEY,

/s/ PHILIP M. AITKEN,

Attorneys for defendant
American Potash & Chem-
ical Corporation.

(Receipt of Service)

[Endorsed]: Filed July 10, 1947. [187]

[Title of District Court and Cause]

STIPULATION RE RECORD ON APPEAL

Whereas, upon the 1st day of July, 1947, appellant above named appealed to the United States Circuit Court of Appeals for the Ninth Circuit from certain orders and rulings set forth in appellant's notice of appeal, hereby referred to, and at said time filed its designation of the contents of the record on appeal; and

Whereas, upon the 10th day of July, 1947, appellees above named filed their counter-designation of additional portions of the record, proceedings and documents to be included in the record on appeal.

Now, therefor, it is stipulated by the parties hereto as follows, to-wit:

1. Time for filing the record on the said appeal taken by appellant, as aforesaid, in the appellate court and docketing the cause there is hereby extended to and including September 14, 1947.

Dated: July 19th, 1947.

STERLING CARR,
Attorney for Plaintiff and
Appellant.

BROBECK, PHELGER &
HARRISON,
MAURICE E. HARRISON,
MOSES LASKY,
NEWLIN, HOLLEY,
SANDMEYER & COLEMAN,
PAUL SANDMEYER,
Attorneys for Defendants and Appellees, Borax
Consolidated, Ltd., Pacific Coast Borax Com-
pany, United States Borax Company.

OLIVER & DONNALLY,
WILLIAM J. FROELICH,
CHARLES A. BEARDSLEY,
PHILIP M. AITKEN,
Attorneys for Defendant and Appellee American
Potash & Chemical Corporation.

It is so ordered:

LOUIS E. GOODMAN,
United States District Judge.

Dated: July 24, 1947.

[Endorsed]: Filed July 25, 1947. [188]

[Title of District Court and Cause]

NOTICE OF APPEAL FROM ORDER GRANTING MOTIONS OF DEFENDANTS TO DISMISS AND FILED HEREIN ON MAY 6, 1947; ALSO NOTICE OF APPEAL FROM THE JUDGMENT ENTERED IN THE ABOVE ENTITLED ACTION ON OR ABOUT MAY 8, 1947

To the Above Entitled Court and to the Clerk Thereof, and to Defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, and American Potash & Chemical Corporation:

Notice is hereby given that Burnham Chemical Company, a corporation plaintiff and appellant above named, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from—

- (a) The order made and entered in the above-entitled action on the 6th day of May, 1947, granting the motion of defendants and appellees herein to dismiss the above-entitled action;

And further from—

- (b) The judgment entered by the above-entitled Court in the above-entitled action on the 8th day of May, 1947.

Dated: August 2nd, 1947.

STERLING CARR,

Attorney for Plaintiff and
Appellant.

Names and address of the attorneys for said appellees are as before noted.

[Endorsed]: Filed August 2, 1947. [189]

[Title of District Court and Cause.]

DESIGNATION BY APPELLANT OF CONTENTS OF RECORD ON APPEAL FROM ORDER DISMISSING ACTION, AND FROM JUDGMENT, AND FROM ORDER DENYING NEW TRIAL

To the Clerk of the above-entitled Court:

Burnham Chemical Company, a corporation, the above-named appellant, respectfully requests that the following portions of the record, proceedings and evidence in the above-entitled action be included and contained in the record on appeal to wit: [190]

1. All of those documents requested in the designation by appellant of contents of record on appeal filed herein on July 1, 1947, Provided that only one set of said documents—eleven (11) in number—need be supplied for said record.
2. Notice of Motion for directed verdict and for new trial.
3. Order of Court denying the above motions.
4. Portions of the record designated in the Counter-designation by appellees on appeal heretofore taken on July 1, 1947, and which counter-designation was filed herein on or about the 10th day of July, 1947.
5. This designation.

All of the above, provided, however, that no more than one of any of the documents referred to in

this designation or in the prior designation referring to the first appeal taken herein on July 1, 1947, or in the counter-designation by appellees filed herein on or about the 10th day of July, 1947, be included in the records on appeal from the said two appeals taken herein.

Furthermore, the records on both of said appeals shall be consolidated so as to form one record on both of said appeals taken herein, and as required by the Rules of Federal Procedure.

Dated: August 2nd, 1947.

STERLING CARR,

Attorney for Plaintiff and
Appellant.

[Endorsed]: Filed Aug. 2, 1947. [191]

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[Title of District Court and Cause.]

STATEMENT OF POINTS UPON WHICH
APPELLANT INTENDS TO RELY ON
THE APPEAL TAKEN FROM THE
ORDER GRANTING THE MOTION TO
DISMISS AND FROM THE JUDGMENT
ENTERED IN THE ABOVE-ENTITLED
ACTION

Now comes Burnham Chemical Company, a corporation, the Plaintiff and Appellant above named, and pursuant to Rule 75(d) of the Federal Rules of Civil Procedure sets forth a statement of the

points upon which appellant intends to rely on appeal as follows: [192]

1. The District Court erred in granting upon May 6, 1947, defendants and appellees' motion to dismiss the above-entitled cause.

2. The District Court erred in rendering judgment in the above-entitled action on May 8, 1947, in favor of defendants and appellees and against plaintiff and appellant.

3. The District Court erred in making its pre-trial order upon the 16th day of January, 1947, that the special issue to be submitted to the jury would be as follows:

“At any time from May 17, 1929, to October 10, 1939, did plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Anti-Trust Laws of the United States?”

4. The District Court erred in holding upon the 6th day of May, 1947, that the conspiracy charged in the complaint on file herein was not a continuing conspiracy.

5. The District Court erred in holding upon the 6th day of May, 1947, that the cause of action set forth in the complaint on file herein was barred by the statute of limitations.

6. The District Court erred in denying upon April 21, 1947, plaintiff and appellant's motions for a directed verdict and for a new trial on the question of the statute of limitations.

Dated this 2nd day of August, 1947.

/s/ STERLING CARR,

Attorney for Plaintiff and
Appellant.

Received a copy of the within this 1 day of July,
1947.

BROBECK, PHLEGER &
HARRISON,
FITZGERALD, ABBOTT &
BEARDSLEY.

[Endorsed]: Filed ^{Aug 2,} July 1, 1947. [193]

[Title of District Court and Cause.]

COUNTER-DESIGNATION BY APPELLEES
BORAX CONSOLIDATED, LTD., PACIFIC
COAST BORAX COMPANY, UNITED
STATES BORAX COMPANY, AND
AMERICAN POTASH & CHEMICAL COR-
PORATION OF CONTENTS OF RECORD
ON APPEAL PURSUANT TO RULE 75
OF THE RULES OF CIVIL PROCEDURE

The appellees, Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company, and American Potash and Chemical Corporation, each acting for itself, hereby designate the following portions of the record, proceedings and evidence, in addition to those designated by the appellant, to be contained in the record on appeal in this action, taken, by appellant on August 2, 1947:

1. Order of Court granting defendants'

motions to dismiss, filed herein on or about May 6, 1947.

2. Judgment filed herein on or about May 9, 1947.

3. Affidavit of J. C. Lynch in support of Motion to Dismiss and for Summary Judgment filed on January 29, 1946.

4. Affidavit of S. M. Nelson in support of Motion of Defendant United States Borax Company to Dismiss (and exhibits attached thereto) filed on October 29, 1945.

5. This Counter-Designation.

Dated August 26, 1947.

MAURICE E. HARRISON,
MOSES LASKY,
BROBECK, PHLEGER &
HARRISON,
PAUL SANDMEYER,
NEWLIN, HOLLEY,
SANDMEYER & COLEMAN,
Attorneys for defendants Borax Consolidated, Ltd.,
Pacific Coast Borax Company and United
States Borax Company. [194]

OLIVER & DONNALLY,
WILLIAM J. FROELICH,
CHARLES A. BEARDSLEY,
PHILIP M. AITKEN,
Attorneys for defendant
American Potash &
Chemical Corporation.

[Receipt of service.]

[Endorsed]: Filed Aug. 27, 1947. [195]

[Title of District Court and Cause.]

ORDER EXTENDING TIME TO DOCKET

Good cause appearing therefore, it is hereby Ordered that the Appellant herein may have to and including October 21, 1947, to file the Record of Appeal in the United States Circuit Court of Appeals in and for the Ninth Circuit.

Dated September 11, 1947.

LOUIS E. GOODMAN,
United States District Judge.

[Endorsed]: Filed Sept. 11, 1947. [196]

District Court of the United States
Northern District of California

CERTIFICATE OF CLERK TO TO
TRANSCRIPT OF RECORD ON APPEAL

I, C. W. Calbreath, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 196 pages, numbered from 1 to 196, inclusive, contain a full, true and correct transcript of the records and proceedings in the matter of Burnham Chemical Company, a corporation, Plaintiff, vs. Borax Consolidated, Ltd., et al., Defendants, No. 24948G, as the same now remain on file and of record in my office.

I further certify that the cost of preparing and certifying the foregoing transcript of record on

appeal is the sum of \$56.50 and that the said amount has been paid to me by the Attorney for the appellant herein.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at San Francisco, California, this 9th day of October, A.D. 1947.

[Seal]

C. W. CALBREATH,

Clerk.

/s/ M. E. VAN BUREN,

Deputy Clerk. [197]

In the District Court of the United States for the
Northern District of California, Southern
Division.

Before: Hon. Louis E. Goodman,
Judge.

No. 24948-G

BURNHAM CHEMICAL COMPANY,

Plaintiff,

vs.

BORAX CONSOLIDATED, LTD., et al.,

Defendants.

REPORTER'S TRANSCRIPT

December 5, 1945

Argument of Sterling Carr, Esq.

Mr. Carr: May it please the Court, in the zeal of counsel who last spoke to be successful in this

litigation, he has attempted, we respectfully say to your Honor, to try this case once and for all right here by word of mouth through the statements he makes as to the facts in various situations. He has tried to conclude this case once and for all by statements which he has made, and in doing so he has called most largely on the Reno case. He has stated in part the facts there, but not all of them, and while we contend that that case has absolutely no relevancy to the present motion and that they cannot go and seek that case or any statements made in any of the pleadings or affidavits in that connection in support of their motions here, counsel has gone so very wide afield that probably in justice to our people we should state some of the real facts in that situation, and as to the issuance of the judgment.

The action was brought up there, the fraud order was issued, not for the sale of the stock, but because it was claimed by the Department that this solar process of Mr. Burnham was not workable and would not work out. Then Mr. Burnham, through his company, filed his complaint and many affidavits were filed in that proceeding when it finally got to hearing. It dragged and dragged up there for various causes over a good many years, and finally when they did get it to trial Judge Norcross, after some days of argument, granted the injunction and restrained the postmaster at Reno and the Postmaster General from operations under the so-called fraud order.

Then the matter was set down by Judge Norcross in January. The trial was set for the following April. At that time, or shortly before the date set, the matter was continued by consent, and, as I read the record up there, there was something like sixty-odd continuances granted, not for ten days or so, but they would be granted for the term of the court, or a certain period. Those are all of record there; so the continuances were all had by the mutual consents of the parties.

Finally, one day, and without any notice whatsoever to the plaintiff in that action, or without any knowledge on the part of anybody, Judge Norcross took his seat on the bench and dismissed the cause for lack of prosecution, after all of these continuances had been had by the consent of the parties. I think the order reads, "The District Attorney—" that was Mr. Atkinson, up there, who was the District Attorney at that time, and who was in court—"The District Attorney making no opposition, this matter was dismissed for lack of prosecution."

The plaintiff did not know anything about that action, and never heard of it until a long time afterwards. Shortly thereafter, we contend and will show on the trial of this case, that fraud order was reinstated at the instigation of some of these gentlemen who are now trying to escape their wrongdoing. I might also state that efforts are now being made to have that removed, but Mr. Burnham at that time did nothing at the moment, because he was without funds. He was disheartened. He was down. He was pretty nearly licked.

In addition, Frank Heney, one of his attorneys, was very sick, or had gone on the bench, and the matter dragged until it finally came into this court. The statements we contend made in that matter do not in any respect bear out Mr. Lasky's contentions here that the objections were made on the ground of the formations of the conspiracies alleged herein. The facts, if we ever get to that, will show just to the contrary. The facts will show that the wrongs inflicted upon these people all during this period and with that fraud order was without authority or basis, whatsoever. Some of the finest and greatest engineers in this country filed affidavits in that proceeding as to the practicability and efficiency of this particular system which Mr. Burnham devolved, and we will show that even some of these defendants used or attempted to use that same process until they finally backed away, not, however, from any defect in the process, itself, but because they were fearful of their activities and what might result therefrom.

We contend, as I said, that the Nevada situation has absolutely no relevance to this, at all, that this complaint must be adjudged on its face, and if we have stated a cause of action under the Antitrust Laws, irrespective of what the facts might be as to what was contained in these various complaints and affidavits in Nevada, which is immaterial, if the complaint here states a cause of action, that is sufficient for purposes of this motion. We do not want to lose sight of the fact that every one of the allegations of this complaint are admitted.

We charge them with fraud and various other activities, all of which, for the purposes of this motion, are admitted. If your Honor should deem it proper that the motion should be overruled, they are not without right, for they then come in and plead the statute, and under the authorities we can have a separate trial first as to the statute and its applicability, and of course that must be true. In our memorandum we cited authorities directly to that point. On such trial we are ready to meet them, and we invite such a plea on their part, because it will open up many, many interesting facts. That is the way this situation, if it has any effect at all, should be reached, by separate trial. It has been done in other cases, as is apparent from our memo. But we say for purposes of this motion they have absolutely no right to raise the factual issue as to whether or not we had knowledge or were put on notice, whether or not the facts existing as alleged by them really did exist. You can't try the statute of limitations by affidavits or casual statements of counsel in the argument. The questions raised are questions of fact, and would have to have much evidence on both sides in order for a proper determination.

In addition we believe, as set forth in our memo, it is very questionable whether the question of the statute of limitations as a factual situation could be raised in this way. The New Rules provide that the statute shall be raised by a responsive plea. We have cited that rule, and your Honor will see that it provides that is the way to raise the statute. We

recognize and admit that if the complaint is so barren of any fact so as to bring the case within the statute, and it appears apparent right on the face of the complaint that there is no cause of action stated, then, of course, the plea would be proper; that is, on the ground of lack of sufficient allegations, and not alone on the ground of the statute.

The Court: As I recall, there is a proposed amendment for a revamping of the rule in the pamphlet that I received, to endeavor to eliminate the so-called speaking motions for dismissals, but to confine that type of motion to motions for summary judgment where, if there is no factual issue, the court may enter judgment in favor of one party or another, although there are cases which hold—and I have quoted them myself and used them in decisions—ratifying the procedure of speaking motions to dismiss. But those who have been working on the rules seem to think that where dismissal is sought in the pleadings stage, the grounds being the failure to state a cause of action, a speaking motion is improper, and that should only be invoked in the case of a motion for summary judgment.

Mr. Carr: Thank you, your Honor.

The Court: I do not know whether that is going to be adopted by the Supreme Court, or not, but I noticed it is being presented as a proposed amendment.

Mr. Carr: It is impossible to answer all the cases or authorities cited by counsel. They have been most diligent in their research and they have given to their clients the very best that is possible within them. They have cited many, many authorities,

many of which we believe have no applicability. But of course, you can find comforting words in every situation. If you can't find them in one case, you can take a paragraph from another case, lending very easy reading to the parties desiring to argue that way, and we think, with all due respect, counsel's brief is largely made up of such citations. They hope for the best, and they find some quotations that might give them some courage to advance such a thought. But listening to the arguments, one would believe we were suing for damages for each specific overt act, rather than under the statutory actions for treble damage suits. You would think that they attack each one of those overt acts and try to show not only their inapplicability due to the statute, but how it could not have happened, how we guessed wrong, and various other things. They are trying again the facts out on this particular motion. They seem to have lost sight of the fact that this action arises under section 15, Title 15. Judge Caffrey said, in his opinion in the Aluminum case, the long one in New York, that such an action as this originally laid in common law, and there was some common law applicability of it. I think that might be in a little doubt, but anyhow this right of action is purely statutory now. It was created, so far as we are concerned, in this particular statute, and the statute reads:

“Any person who shall be injured in his business or property by reason of anything forbidden in the Anti-trust Laws, may sue therefor in any district court in the United States,” and so forth, “in the district.”

Now, what does that mean? By reason of anything forbidden in the Antitrust Law? Well, when we turn to the section on combination in restraint of trade:

“Any contract, combination in the form of trust or otherwise, conspiracy in restraint * * * is hereby declared to be illegal.”

Any injury that will grow out of that combination or contract or conspiracy will give cause for a right of action by the party injured.

Section 2 is the monopoly section:

“Every person who shall monopolize, attempt to monopolize, or combine or conspire with any other person or persons to monopolize any trade among the several States is guilty.”

Therefore the rights granted here grow out of those particular combinations, either in restraint or to monopolize. They do not grow out of the overt acts committed in support thereof. And that, I think, must have been the very thought your Honor had in mind yesterday as to the discovery of the conspiracy. It is the conspiracy in this class of case that gives the basis for the cause of action. The overt acts are merely the facts of damage, the statement as to damage, what damage has been suffered and will be in a measure the measure of damages and not the basis of the action, itself. The real basis of the action is that we have been injured under the Antitrust Laws. Now, those Antitrust Laws forbid the conspiracy, and everybody who

combines, everything they do in contemplation of or pursuant to one of those conspiracies is actionable, providing the damage is suffered by the plaintiff in the proceeding.

The Court: Would this be a convenient time for you to stop?

Mr. Carr: Certainly, your Honor.

The Court: I know you probably just got started. I think we had better take the recess at this time.

Afternoon Session

Mr. Carr: If it please your Honor, at the noon recess we were referring to section 15, and we made the statement that no action under the Antitrust Acts, as this is, can be had unless a conspiracy exists. The conspiracy to monopolize is the basis of the action under such section 15, so the conspiracy in this case, unlike conspiracies in other actions, is really the basis of a situation of this character, and the overt acts are but the measures in a sense of the damages which have been suffered by the plaintiff, if he has suffered through these conspiracies. Any thing done under this conspiracy or confederation which injures a plaintiff constitutes an overt act, and those overt acts combined will be the measure and basis of the judgment that plaintiff might recover.

We believe that the statute of limitations does not begin to run until the last overt act. As long as the conspiracy is continuing, and the injury is

continually being done to the plaintiff, we believe the statute has no application.

I find I left out of my memo three cases which should have gone in there, but were omitted from the memorandum in the hurry of preparation. I would like to leave them with your Honor. I think this case of *Northern Kentucky Telephone Co. v. Southern Bell Telephone & Telegraph Co.*, 73 Fed. (2d) 333, Sixth Circuit, in which certiorari was denied, is most applicable. There it was said in the opinion:

“There remains to be determined the question as to when the statute of limitations to run against an action for conspiracy. It is the contention of the plaintiff that a conspiracy, until successful or terminated, is a continuing wrong, and that, so long as damages flow, and this without regard to the time of formation or the commission of overt acts, the statute does not begin to run. Reliance is placed upon *United States vs. Kissel*, 218 U. S. 601, 31 Sup. Ct. 124, 54 L. Ed. 1168; *Patterson vs. United States*, 222 Fed. 599 (C. C. A. 6), and *Eldredge vs. United States*, 62 Fed. (2d) 449, 450. These decisions do not sustain the plaintiff's contention. They go no further than to hold that a conspiracy continues so long as overt acts are being committed by one or more of the conspirators, even though there is no new agreement among them subsequent to the original agreement. This is made clear by the language of Mr. Justice Holmes in the *Kissel* case at pages

607, 608 of 218 U. S.: 'A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act,' and by the comment of the court in the Eldredge case: 'The overt act is an essential ingredient of the crime; a conspiracy which contemplates a series of overt acts is a continuing conspiracy, and the statute does not commence to run until the last overt act, performed in compliance with the original agreement, has been accomplished.' Since in the Eldredge case overt acts in furtherance of a conspiracy charge were proven to have been committed within a few months of the indictment, it was held that such acts were the acts of members of the conspiracy."

We believe, your Honor, that that states the actual law, and we do not agree with counsel in the statement that the Kissel case, which is probably the leading case on the question of a continuing conspiracy, is applicable only to criminal law. There is nothing in that case which so holds, and so far as we have been able to find out—and we have looked—I find no case at all which so holds, that is, which confines the Kissel case only to criminal situations. True, in some situations the Kissel case is referred to as a criminal case, but you will find that most of those cases where that comment is made, if not all of them, they go back and cite the Foster & Kleiser case. In reference to that

particular case, which has been relied upon and which, I think, is their principal authority, when that case is carefully read it will be determined that all the language in that case about the Kissel case on these various other points raised was mere dicta, for in that case there could have been no possible chance of recovery, and the court in writing that opinion must have had that fact in mind and moved solely along that line, because while the court does not hold that subdivision (4) of 338, the fraud and the concealment provision, is not applicable to situations of this character, it goes on to say in that particular case it could not be called upon because the defendant had admitted to the plaintiff that he was trying to put him out of business. That is far afield from the present case, where the contrary is the fact. The defendants here, through their agent and representative denied, when charged by Burnham with that fact, denied—and let me say here that he did not, as Mr. Lasky contends, go to Zabriskie and say that he was charging him with the formation of a conspiracy; that was not the fact—what the plaintiff alleges in the complaint is that he went and charged him with being responsible for those price cuts and put them out of business. Now, Zabriskie denied that, and plaintiff, taking him by his word, went his way on the situation. And so we say that the Foster & Kleiser case does not go to the extent charged or called upon by the defendants. It is put solely upon the ground that the statement was made, and therefore the application of sub-

division (4) was not proper, could not be made, and they had to go back to subdivision (1), the straight three-year statute, because facts were introduced which showed knowledge on the part of the defendants and an admission by the defendants of their wicked attempts.

Here, as I said, we have alleged the formation of the conspiracy, which is the basis of our action in this particular class of case, and particularly here. We allege that the conspiracy was formed not only in 1929 but prior to that time, and we allege that in 1929 it was reduced to a contract. They made a formal contract instead of allowing it to rest in letters and exchanges of confidences existing prior to that time, but they put it into writing in 1929, and then subsequently followed it with another contract made in this city in the form of letters and other things subsequently, in which they took in some other victims whom they wished to get out of the way. So the basis of our action lies, as I have said, in the conspiracy formed. That is the cause of action which really forms our cause of action.

The Court: Is it your contention, Mr. Carr, that plaintiff was put out of business in 1929 as a result of an unlawful conspiracy and that the statute does not run as long as the conspiracy continues to be in effect?

Mr. Carr: No, I do not go that far. My idea would be that it would run from the last overt act.

The Court: What do you allege in the complaint to be the last overt act?

Mr. Carr: The Little Placer claim. They have studiously avoided any discussion of the Little Placer claim until this morning, and then Mr. Lasky comes in with a motion to strike it out; it has no applicability. We could not prove any damages from it, but we make a live issue of that thing in the complaint. Beginning with paragraph 77 on page 36 we start in a story of the Little Placer claim. In paragraph 77 we approach it historically. There were, as a matter of fact, only 10 acres in this Little Placer Claim. It was the one, the only outstanding Kernite deposit that was known to exist in the world, and we had made our application. Counsel was right this morning in describing the two methods of acquisition, either by a mineral claim or by a lease, and the Government held that it was at one time subject to a lease. Now, we made application first on the land and our lease was turned down as a matter of law. Subsequently we went through various divisions of the Department of the Interior, and when we got to the head we finally won out completely, and the defendants, here, who were applying, were put out of court, leaving the claim wide open, which we believe was subject to our application which we had in, and on page 37 we set forth, we state:

“That the facts of said endeavor of plaintiff to secure said lease upon said ‘Little Placer’, and the opposition of defendants thereto, is as follows:”

Now, the defendants pursued us wherever we went in search of land or property, including this

Little Placer claim, particularly because of its very valuable possibility to the thing, and not only possibility, but a very valuable asset, because, as I have said, it was the last known and the only known held property in which the Kernite could be produced. The defendants held complete monopolization. They endeavored to keep us out of the Little Placer with further activity on their part, in the performance of their monopoly which they had. Then we go on in paragraph 78 to give some further account of our activity, and we say:

“As set forth in paragraph 71 of this complaint, the defendants, Borax Consolidated, Ltd., and Pacific Coast Borax Company, have controlled since 1934, and now control, all of the world's known Kernite deposits except 10 acres thereof, known as the Little Placer claim. Ever since June of the year 1928 plaintiff has been endeavoring to secure a lease from the said United States Government upon said Little Placer under and by virtue of the laws appertaining thereto, but all of such endeavors of plaintiff have been contested, fought and blocked by the actions of the defendants herein in pursuance to the said unlawful plan and conspiracies of said defendant to own, control and market all borax in all its forms and products, in all the world, and to prevent competition therein, and to that end, to drive plaintiff from all activities and business in the field of borax at its ownership, production and sale.”

Then we set forth, as I say, the various acts, not only of ourselves, but of the defendants, and go on to show that our application for this particular lease is still pending, and the defendants, after this defeat before the Department of the Interior, applied for a writ of mandamus in the District Court of the District of Columbia to force the Secretary to give to them this lease that they claimed.

Another illustration contrary to that cited by counsel this morning to the effect that you could not reach that matter in court by legal proceedings, and that the matter rested wholly within their discretion is that while that action was pending for the writ of mandamus, the Government brought on for trial its action here before your Honor, and there the defendants charged stood up and admitted their wickedness and their guilt——

Mr. Harrison: You do not mind if I interrupt again?

Mr. Carr: Not at all. I expected it.

Mr. Harrison: There was an express statement in the decree that we admitted nothing, your Honor.

Mr. Carr: That is an anacronism. You cannot say you admitted nothing. This question is going to come all through this matter. I do not say that those judgments in that particular case constituted *prima facie* evidence, and that is the only thing that the court says they will not constitute, but that does not prevent us from calling upon that judgment in that case as an admission. It is ridiculous, and

it never could be held that people coming in here and paying \$140,000 and saying, "I never did it at all"—if that was true and they had never been guilty and were not pleading in fact guilty to the charges made, the court would have had no jurisdiction. It would have had to throw the case out. The court could never have levied the fine. We do not contend, as I say, that any of those judgments, either in the civil or in the criminal case, are prima facie evidence, but we do say that it is evidence of admission of guilty, and you can't get away from that no matter what you put in the judgments.

Mr. Lasky: You overlooked the cases we cite.

Mr. Carr: Oh, yes, but they do not go that far. You picked out a few little words here and there, but they do say they cannot be used as conclusive proof of the charges made, which we admit, but we do say that they do constitute admissions just like if I had met these people on the street and said, "Here you are charged with these crimes and with these misdemeanors and these acts," and they said, "Yes, we did it. We are guilty, but we thought we could get by with them." Then they come into court and enter a plea of nolo contendee, which is a sort of polite plea—that is about the best you can say about it. It is worse than a Scotch verdict—"Not guilty but don't do it again." It is a confession. You can't get away from it, no matter what you put in your judgment here that they do not confess anything. If they did not confess it, how could the courts have levied the fine? You can never contend, in the face of the charges made,

that it is a voluntary payment. They came in here and admitted those allegations. They have got to in order to save their hide. They know what might happen to them if the court did not take it. These consent decrees are simply a consent to a decree being entered against them in the matter, and then is is customary to go on and say, "Well, we do not admit anything. We are not guilty of anything, but we are going to pay you \$140,000, or whatever the court says we must pay."

There can be no question as to that. I will be glad to meet you on that when the time comes. I think there are plenty of cases and sound reasoning on that, and the statute, itself, only says it shall not be prima facie evidence, which is all right, but that does not say that they are not admissions of guilt, and that is exactly what occurred here.

Now, with respect to the Little Placer, we go on to say:

"That all of the above acts done and performed by defendants, or some of them, have been pursuant to and in furtherance of said conspiracies, plans and combinations hereinbefore in this complaint set forth and described with the intent and purpose of controlling and dominating, throughout the world and in interstate commerce, the mining, production and sale of borax in all its various forms and products, and with the intent and purpose of injuring and destroying plaintiff's activities as herein set forth and removing plaintiff as a competitor of defendants, or some of them, in

the said mining, production and the sale of borax in all of its forms; that due to said intents, purposes, and acts of defendants, plaintiff has been damaged," and so forth.

That is a complete tie-in, a complete overt act. Nothing could be a stronger overt act than the activities of these defendants throughout this whole proceeding.

And remember, may it please your Honor, so far as this motion is concerned, those are all admitted facts, that they did all of these things just as alleged in the complaint, and we cannot say that that is not an overt act. Some contention was made that because we might not be able to recover damages by reason of their activities—true, we cannot for this particular overt act, unless we can show actual damage, but that comes on the trial of the case and not on a motion to dismiss, where the statute is the main ground for their motion. That is factual and not legal to the extent we are considering today.

The Court: Your client could have continued on in this business after 1929 without this Little Placer claim, could he not, in the absence of the alleged activity of the defendants?

Mr. Carr: No, your Honor; as a matter of fact, when we were put out of business by the price cuts in 1929 we still had our plant, and we hung on and tried to make the thing go. We were trying to get this Little Placer. If we could have had the Little Placer we could have secured Kernite and we could have produced it somewhat on a comparable basis

with the defendants, if we were not run out of business otherwise some way or other, but that would have given us a chance. We still own it. It is not alleged in the complaint as to the year, but we do say——

The Court: I think you are referring to page 36.

Mr. Carr: Maybe that is it, your Honor. It states, "And thereafter plaintiff struggled on as best it could to survive, but ultimately it was obliged to default in the payment of its rentals due under such Searles Lake lease."

We had one of those leases there and could not pay under it.

"——with the result that the United States of America, as lessor, canceled said lease and retook possession of said lands and buildings permanent installations thereon; that thereafter certain stockholders of plaintiff, in an endeavor to save the situation, applied to said United States Government for a lease upon said premises and equipment; said application was subsequently denied, and thereafter said lease and improvements were offered for bid, at which time defendants, American Potash & Chemical Company, bid for said lease and was given the same for the sum of approximately \$130,000; (said lease contained certain additional land.)"

The Court: Let me interrupt you again.

Mr. Carr: Yes, certainly, any time.

The Court: I am trying to get your point clear in my mind. Assuming, as you have alleged, the

plaintiff was forced out of business, and, as the plaintiff alleges, the plant and business of the plaintiff was shut down in January, 1929——

Mr. Carr: Yes.

The Court: And thereafter he tried to keep his lease on the source of supply in good standing, but because the business was shut down and he did not have any money he was unable to keep that in good standing. I think that is a fair inference.

Mr. Carr That is correct.

The Court: So from time to time he besought the Government to keep that lease in good standing for him.

Mr. Carr: Yes, your Honor.

The Court: Because his business was closed down, or he could not get the money to do that, he was ultimately unsuccessful in maintaining that. Where is the overt act of the defendant that has to do with that?

Mr. Carr: The overt act is the Little Placer claim.

The Court: Leave that out for the moment. What overt act of the defendants in connection with the matters that are alleged, before you come to the Little Placer claim, what act of the defendants occurred that resulted in damage occurring after 1929 aside from this Little Placer claim?

Mr. Carr: Nothing. We do not allege anything.

The Court: The Little Placer claim, as I understand—I just want to get it clear in my own mind—was an entirely different claim.

Mr. Carr: Oh, yes, a different claim.

The Court: It was not a claim they were availing themselves of as they were the other lease in order to carry on the business?

Mr. Carr: No, it was a claim we were endeavoring to secure, as I said, to enable us to carry on with our properties which we had then. While the exact date of the cancelation of this lease is not alleged in the complaint, it was in 1938. We filed our application on this Little Placer on June 1, 1928, so that was long before, ten years before we were shut down, and that was before we were run out of business, too. So we started to secure this Little Placer claim, or endeavored to secure it, and we were fought all along the line by the defendants. So we believe that that tied in with the general operation, with our general operations. Now, with the loss of this lease we cannot directly—I mean so far as I know the defendant did not go and cause the Government to cancel our lease, although there are many suspicious circumstances—in fact, the purchase by one of them of this particular property—but all of that time we were endeavoring to secure this Little Placer, which would have afforded us material on which to operate and carry on our business at the plant which we had already contracted.

Mr. Lasky: The Searles Lake plant was at Searles Lake. The Little Placer was several hundred miles away, and was a mine. Do you contend we were going to use the material from the mine in the Searles Lake plant?

Mr. Carr: Certainly. They carry many things—for example, aluminum and other ores—over two or three hundred miles. Take the iron ore up in the Michigan District. They bring it across the Great Lakes. Take Ford's factory there at Detroit, or near Detroit.

The Court: I do not think that is what counsel means. He is referring to the character——

Mr. Lasky: Yes, the Searles Lake process was one of evaporation from the lake.

Mr. Carr: We could have changed that. What is the difference? We had our buildings and our plant there. It is something which could have been changed, or if necessary we could have gone and built a plant, but we had our plant and we were perfectly willing to move it. There is nothing strange about that, bringing raw material to your plant, and there is nothing strange in changing the machinery in your plant to handle a different product. There is nothing strange in that, at all, except you might have stuck ice picks in our tires going down there while we were carry it in. But we contend, your Honor, that the Little Placer is tied in directly into *your* business. The overt act continued from 1929, from the day we filed our application we met opposition from these people, and naturally they were doing their best to secure these ten acres because if they did, they would have had every known supply in the world of this Kernite. They could have had no opposition or no competition, whatsoever, and it was necessary for them to do that, as they felt for their own protection to

secure this in order to accomplish the fruits of the conspiracy which had long before that been established and created. And so we say that our complaint, blushing say it in the face of all the charges made against the fruit of it, that we do allege the combination, the unlawful combination both under sections 1 and 2 of the Antitrust Act. The complaint goes on and shows the performance of these overt acts, a continual set of them from the time we got in the business, and particularly from 1929 right on, and the denial by Zabriskie of intention to injure, and the further fact that we had no knowledge of the formation of this conspiracy. We knew nothing about it. That, we contend, was the basis of it, and the concealment of those conspiracies. As your Honor said yesterday, they did not go out on the courthouse steps and talk blatantly about what they had done and were going to do to everybody. Of course not. They were concealed, and while we knew and felt the force of all these overt acts that were being placed against us during all this period of time, we had no knowledge of a conspiracy. We did not know that this contract of 1929 had been entered into prior, nor did we know of it subsequently. I think they call it the contract made after they came out here, shortly after their meetings in Germany and in England. They came out here and, as I said, scooped other victims into the thing and renewed their conspiracy with the Stauffer people, making them parties. They carried on a continuous conspiracy, and the only thorn in their side was Burnham. He was

down there struggling to get ahead with his comparatively small plant against this octopus which was pouring out its wrath and indignation that we should even have presumed to set out on a venture of this kind as against their wishes.

As I say, we have proved the conspiracy. We have alleged the conspiracy in our complaint. We have alleged the overt acts, and we have alleged the last of which was the Little Placer situation, which was continued until they confessed their wickedness in this court and contended that this court should make as a part of its judgment an order that they should abandon all applications, all attempts to secure that particular claim. And it continued up until past the filing of our particular suit. And let me say this, that this conspiracy, framed under the provisions of sections 1 and 2 of the Antitrust Act, was never known to us and was not disclosed, and we could not find out about it until after the Government, with all its might, had brought its suit here and had disclosed the formation of that 1929 agreement and the subsequent western agreement out here.

The Court: That conspiracy that you discovered on the filing of the Government's suit was an agreement that was entered into after your business was closed down?

Mr. Carr: Oh, no, your Honor.

The Court: You have alleged that in your complaint. You say there was another conspiracy——

Mr. Carr: No, but prior.

The Court: There was a prior conspiracy that resulted in the loss of your business, but the conspiracy that you discovered, as alleged in that complaint on the filing of the Government's suit was a conspiracy that is there described as having its inception in 1929. Am I not right about that?

Mr. Carr: No, the conspiracy in point of time you are, but the conspiracy which is the basis of our action is the original conspiracy, and that which antedated 1929.

The Court: I think you are right about that, but you have alleged a conspiracy prior to that time.

Mr. Carr: Yes.

The Court: But I do not recall any reference having been made to any allegation in the complaint that that conspiracy you discovered at the time of the filing of the Government's suit.

Mr. Carr: We do say that all the stipulations and acts of the defendants were not known until the commencement of this action. Let me see if I can find that. In our amendments we cover that:

“That plaintiff had no knowledge of said conspiracies and combinations herein set forth, or the intent or purposes of said defendants in the performance of the acts herein in this complaint set forth until on or about the commencement of an action by the United States versus certain defendants herein and filed in the United States District Court for the Northern District of California, Southern Division,

on September 14, 1944, and numbered therein 23690-G; that likewise plaintiff had no knowledge of said 1929 agreement referred to hereinabove and described in paragraphs 62 to 68, inclusive, or of the said prior or said subsequent agreements made pursuant to said 1929 agreement, until the said time of the filing of said action by said United States against said defendants herein on or about September 14, 1944, that while plaintiff did have knowledge of certain acts, things, and proceedings taken, had and engaged in by said defendants, or some of them, and as herein set forth, it had no knowledge, information or belief, or any opportunity to secure such knowledge or information, of the fact of the fraudulent and illegal formation of said 1929 conspiracy, or the said prior agreements which led thereto, or of said subsequent agreements, and was without knowledge or means of knowledge that all of said things, acts and proceedings of defendants, or some of them, as herein in this complaint set forth were so performed and carried out in fraud of plaintiff and pursuant to said 1929 agreement, or said prior or said subsequent agreements, until subsequent to the filing by said United States of said action against said defendants, or some of them, on September 14, 1944."

We believe that that covers the situation exactly, and in the face of their admissions on this motion, the complaint must stand as it is, and shows the basis of the action.

Again allow me to refer to the fact that the action is based on the conspiracies. It is the conspiracies and combinations which give us our rights, not the performance of the overt acts. They are incidental and follow the conspiracies. It is the conspiracies and combinations unlawfully entered into that are the bases of our proceedings here. Of course, we discovered these overt acts as they were done to us. You cannot have a hatpin stuck in your hair and not know you are in trouble somewhere, but where that might come from no one knows. We knew it was coming and it was happening to us, but we knew nothing about the fact that they were all happening to us as the result of these unlawful conspiracies and combinations which were entered into, and it is the discovery or the concealment, rather, of those conspiracies and combinations which are made illegal by the act, itself, and upon which our rights are based. In other words, if there had been no conspiracy, no combination, we could not be here in this court today.

The Court: What do you think about the contention that the defendants have made, that there was some duty to investigate further on the part of your client because the gravamen that constitutes the right to bring an action beyond the statute of limitations must follow from concealment.

Mr. Carr: Personally I do not think much of it, because the Little Placer was an overt act, and if the law of the Kentucky Telephone Company case is to stand, and which we believe is a proper ruling, why, the statute never began to run until the finish of the overt act involved in the Little Placer claim. It never did. It never began to run

The Court You make the point that the period of limitation fixed by the statute has never run because of the fact that there were overt acts being committed continuously?

Mr. Carr: Yes.

The Court: Assuming that is not so, that you are relying on the other——

Mr. Carr: On the conspiracy.

The Court: Yes.

Mr. Carr: I do not think that can be reached here, because we allege in this complaint we had no means of discovering it. Your Honor will recall that even in a common law conspiracy action the courts of this State have said many times a plaintiff is not to be charged with neglect for failing to discover something which is carried on in the secret confines of the defendants, themselves, that no charge of neglect can be made against them. Using the same illustration your Honor made yesterday of the courthouse steps, while a man must be diligent in his activities, what could we possibly have done, may it please your Honor, when these price cuts were coming on us and things of that kind, how would that indicate to us or how would we know or what means would we ever have of discovering the fact that this conspiracy had been formed and was entered into in writing either in England or in Germany, and also out here at the Fairmont Hotel when they did come out here subsequent thereto and made additional conspiracies with these Stauffer people and these Western people?

The Court: That raises very squarely, after all the discussion, a very simple question, doesn't it, that if a man is engaged in business and by the acts of one or more of his competitors he is forced out of business, the years go by, and the Government investigates and brings action many, many years after the occurrence of these events on the ground that these competitors have engaged in an unlawful conspiracy going back over a long period of time, that would mean, would it not, there would be no limit to the time when the party aggrieved could bring an action, until such time as when someone with great resources was able to discover that what happened was the result of a conspiracy?

Mr. Carr: What is wrong about that? Let us have that admitted for the face of the record. Let us admit it. What is wrong about that? Why shouldn't a person be punished for his wrongdoing when he is discovered, when the very gist of the thing is proof of the combination, which was illegal at all times? That is the purpose of subdivision 4, not to allow fraud and concealment to go uncharged or unchallenged.

The Court: Aren't there some other considerations, though, the difference between private rights and the public interest? A private right might lapse even though it arose out of a fraudulent transaction because of other considerations, due to the passage of time, no matter how fraudulent the scheme might be as to private rights. When you get into the field of public interest you have a different consideration. Do you think that makes any difference?

Mr. Carr: No, I do not think so, your Honor. I think that fraud in the violation of a statute, which is a fraud on the people, should never go unchallenged, especially when it is concealed. We allege it was concealed. In the next paragraph we go on to say they doctored their books and covered up in their books. Of course, there can be no question on that—I do not know to what extent—but the Kirstley letter, alone, which came before your Honor on our motion to impound, shows that their books were figuratively fixed. We had no access to their books. The Court will take knowledge of those facts. I think the decisions in those cases go to that extent, that a plaintiff will not be charged with neglect for that which he could not do. What right would we have to go to them and say, “Here, we want to look at your books. We think you are a lot of crooks.” What would have happened? We would have been put down the front stairs so fast we couldn’t have gotten in again. We had no right to see their books and records, and all this conspiracy rested in their own bosom and among themselves. As your Honor said, they do not shout this from the housetop at all. A conspiracy of this kind is always hidden in the dark, and there is no opportunity for anyone except themselves, and many of their own crowd no doubt did not know about the wickedness in which they were engaged, and the extent and purposes of it. So we say in the face of the motion today, in face of the statements in the motion that the complaint states these facts, and that those facts alleged are true in the com-

plaint, it is a concealment. Allow me to say to your Honor again it is our contention that it was the concealment of the conspiracy that was formed, two conspiracies—let me put it in the plural—that is the crux of the action. It is not the overt acts at all. It is the concealment of the conspiracy, because when you read this section 15 again, “Any person who shall *be in* his business or property *by* reason of anything forbidden in the Antitrust Laws may sue therefor,” and so forth, the violation of the Antitrust Law is a conspiracy. They have to enter into a conspiracy, and if the injury results to the plaintiff as the result of such conspiracy, that is a continuing conspiracy. I think if your Honor will be good enough to read that Kissel case and the Telephone case and the others cited there you will see that point, and I do not think there is anything in the Foster & Kleiser case which militates against this as all. They do go on to say in there—and I make no criticism of Judge Lord, for whom I have the greatest regard and respect, but in writing the opinion and reading it you will see that all reference to the Kissel case and all reference to the contentions of plaintiff in that particular case as coming within this subdivision (4), in which we claim to come also, is dicta. It is dicta in the light of the admission by the defendants of their intention to put the Special Sign Company out of business. It is for that reason that counsel have been so active and so anxious to get before your Honor on this motion the Reno proceedings, and some allegations that went into the complaint

up there are in Burnham's affidavit. Now, we will be glad to meet that factual situation and explain the whole situation when the proper time comes; if your Honor will set it down for a hearing on that particular question of the statutes we can meet it. It is a factual situation that has no place in this particular argument.

The Court: Of course, if the facts were established that you knew there was a conspiracy to violate the antitrust laws at that time, you would be barred.

Mr. Carr: Yes, but they could not raise it on this motion, your Honor, in the way in which it is presented by ex parte affidavit. You can't try this case by affidavit.

The Court: Of course, that is a pretty important question.

Mr. Carr: Very important. They could not try it, because we have no opportunity to gainsay it. One would say one thing and we would come in with a counter affidavit, and where would your Honor be? There is no right of examination or cross-examination.

The Court: What authorities did you refer to earlier—I think it was this morning, when you said something about a separate trial on the issue of the statute of limitations.

Mr. Carr: Oh, yes, that is done, and we cite the authorities and the rules that apply to that. I will give it to your Honor now, if you would like to see that.

The Court: I did not know that there was any special rule on the statute of limitations.

Mr. Aitken: It does not refer to the statute of limitations alone.

Mr. Carr: It is done all the time, your Honor. I refer to Rule 42(b), headed, "Consolidation; Separate Trials."

"The court in furtherance of convenience or to avoid prejudice may order a separate trial of any claim, cross-claim, counterclaim, or third party claim, or of any separate issue or of any number of claims, cross-claims, counter-claims, third party claims, or issues."

I refer to 36 Fed. Supp., 568, at page 571, where that was done.

That was the case of *Momand vs. Paramount Pictures Distributing Company*:

"During the past ten years, a number of suits have been begun, either civil or criminal, by the United States Government against the motion picture industry. The plaintiff asserts that these have the effect of tolling the statute of limitations under the provisions of Title 15, Section 16, U.S.C.A., set forth above. Whether or not they have such effect depends on whether or not the present suit involves any 'private right of action arising under said laws and based in whole or in part on any matter complained of in said suit or proceeding.' No attempt can here be made to express any view

as to whether some or all the items of damages alleged are barred, because the determination of these questions depends in part upon matters of evidence.

“Enough has been said to indicate that at some time the issues raised by the pleas of the statute of limitations must be considered, and that they can be determined upon much less evidence than would be involved in a trial of the whole case.

“Rule 42(b) of the Federal Rules of Civil Procedure, 28 U.S.C.A., following section 723(c), authorizing the court, in furtherance of convenience, to order a separate trial of any separate issue was applied in *Seaboard Terminals Corporation vs. Standard Oil Company of New Jersey*, 30 Fed. Supp., 671, 672, in the District Court for the Southern District of New York, where the court said:

“‘An antitrust suit, such as the one at bar, is usually complicated and protracted. So, considering the time and expense that may be consumed at an actual trial, and since a determination of this one issue may end the entire litigation, the court is inclined to exercise its discretion in favor of a separate trial of the issues of statute of limitations.’

“The same considerations apply to this suit. Accordingly, it is ordered that the case be tried separately upon the issue of the statute of limitations, and the filing of objections to and the answering of the interrogatories pro-

pounded by the plaintiff to the defendants is to await the trial of this issue.”

That was done by our circuit court, here.

Not long ago, in the case of *Hart vs. Mount Gaines Mining Company*, which went up from Nevada, and in which there were no findings of fact, we, representing the defendant, made a motion that the court hear on the appeal first the question of the failure to make findings, and send the case back, or send an instruction to the lower court to make its findings of fact and send it up without hearing the whole particular at the particular time. So the motion was made and it was granted by the court and the matter sent back to the district court to make his findings of fact and conclusions of law, send them up, and they would then be a part of the record. So it is not an uncommon practice—and I did not cite more than this one case because it was so applicable on the thing and the rule we believe giving them to right to trial is so clear——

The Court: That is cited in your memorandum?

Mr. Carr: Yes, your Honor, on pages 3 and 4. We cite the different sections of the rule and we also cite that Rule 7(c) providing:

“Demurrers, Pleas, etcetera, Abolished.

“Demurrers, pleas and exceptions for insufficiency of a pleading shall not be used.”

Then it goes on to say in another rule, Rule 8, subdivision (c):

“In pleading to a preceding pleading, a party shall set forth affirmatively accord and

satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, and any other matter constituting an avoidance or affirmative defense.”

We believe, as I said this morning, this plea of the statute has no application on this motion. If the complaint of course, does not state a cause of action by reason of the statute and it is apparent on the face of the complaint, itself, that, then, would be reachable by a motion based on the statute. There is no question as to that. But I think that aside from that, that that is the only way under the rules here that the factual question of the statute of limitations can be raised, and I think that when your Honor has had an opportunity to examine that, you will be persuaded that way. I do not want to impose too much on your Honor’s kindness and consideration on this question of conspiracy and the statute of limitations on the face of the complaint. I think I have said about all I could as to that. There is no need of repeating. Your Honor is fully advised of our position, and I would like to leave with your Honor these authorities.

The other questions that have been raised concern the motion to strike. I might say the greater part of our complaint is a copy of the Government’s action in the civil cause before your Honor, and that was done for two purposes: First, because it

was a very accurate and very comprehensive statement of the historical development not only of the conspiracy, but of borax, itself, a description of it, and of the industry, and also of all the facts leading up to the formation of the conspiracy, because our conspiracy on which we rest here is the same conspiracy that came before your Honor in the civil action by the Government; secondly, because we believe the Government's complaint is so splendidly drawn and clearly sets forth the whole history of the matter.

There is no question as to the historical facts being proper in a matter of this kind. In fact, we have cited some cases where part of the overt acts or part of the conspiracy consisted of acts prior, even, to the passage of the Anti-trust Act, and they were held to be proper. They developed the conspiracy from the beginning. If we had just come in here and stated that a conspiracy was formed, that borax was an article of commercial use, that a conspiracy to gain all of that in violation of the Anti-trust Laws was entered into in such and such a year and this and that, we would have been met with countless motions such as we were this morning, that it did not state a cause of action, that we did not describe how they did it, and why we did not peek through a keyhole and see what they were doing in their offices, and matters of that kind, and the courts have all held, and I think we have cited in our memorandum authorities to that effect, that it is proper to set that forth. I refer to *People's Tobacco Company vs. American Tobacco Company*,

and also Judge Caffrey's opinion in one of those Aluminum Company cases, 44 Fed. Supp. That was a case which took two years to try. That is a very interesting opinion, historically as well as from the law which he sets forth. I do not know what happened to that case. I think it is on the way to the circuit court now. The opinion at least is very good. And then there are all of those tobacco cases which are referred to, many of them, in those authorities. So we say certainly no harm is done by setting forth specifically each and every step that we contend was done in the performance, in the making of these conspiracies, or the facts of the historical development of borax and its general application in the field of industry.

I think when your Honor sees the motion to strike the paragraphs with reference to the Little Placer claim, you will see that that is understandable. If they got that out of the way they could rest content on their statute of limitations plea, but we submit that they cannot. When your Honor reads that you will see it is the whole story. Our complaint is individual to the extent that it applies to the plaintiff. It sets forth the effects of the conspiracy and of the acts charged, the offenses performed under the conspiracy, what they did, how they offended against the laws, and the effect of the conspiracy. That is paragraph 71, page 29, the Little Placer, the offenses charged; and paragraph 58 states the specific actions which they did pursuant to the conspiracies, and 67 is an allegation that they were all continuing conspiracies. The plaintiff's situation

begins with paragraph 72 on page 30. From there on it gives the history of the plaintiff, what happened to it from the beginning of the lease that Mr. Burnham had and turned it over to the company, and they move to strike out that portion of the paragraph 73 referring to the fraud order:

“That said fraud order was based solely upon the ground that the patented solar processes transferred by said Burnham to said company were not feasible and would not operate successfully; that said fraud order was brought about largely through protest and demand of a highly placed Federal Government representative who formerly had been, prior to his appointment to said position, the Chicago manager and representative of defendant Pacific Coast Borax Company; that at the time of making said protest said official was the president of defendant Sterling Borax Company.”

For your Honor's information, we might state we have a letter from this man admitting his activities in this particular field.

We think our general allegations which I have read to your Honor already on pages 40 and 41, and then we come in with our amendments and charge directly our lack of knowledge, and supply that which the defendants claim was deficient in the complaint. And so, your Honor, we thank you for this opportunity. We feel that our complaint states a cause of action on its face, and therefore the statute is not available, the statute of limitations, and the matter of these motions should be denied

and the answers should be ordered filed, whereupon if the defendants are insistent and ask, we ask to join with them in an application and have the matter set down for trial on the special issue of the statute of limitations.

Thank you, your Honor.

Certificate of Reporter

I, J. J. Sweeney, Official Reporter, certify that the foregoing 42 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Monday, January 16, 1946

Counsel Appearing:

For Plaintiff: Sterling Carr, Esq.

For Defendants: Moses Lasky, Esq., Charles L. Beardsley, Esq.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Lasky: Your Honor, I believe the first thing that ought to be done is to fix the question or questions which are to be given to the jury so we might know how long the case is likely to take.

Mr. Carr: I think we ought to have the case set.

The Court: When is the case set?

Mr. Carr: The 4th of February.

Mr. Lasky: Your Honor took it off calendar. It is on this morning for re-setting. I understood we were here today to complete the pre-trial conference. At the last hearing on December 2nd we had quite a discussion, and I understood that some specific question or questions of fact were to be presented to the jury, and that both sides were to present to your Honor suggestions to that effect.

The Court: I received communications from both sides in the matter. I received suggested instructions and a memorandum from Mr. Carr, and likewise two letters from Mr. Lasky on the subject.

Mr. Carr: Yes, your Honor.

The Court: I have read them all, and I think we might as well see if we can agree on the issues to be submitted to the jury and then set the case at sometime that would be mutually acceptable.

Mr. Carr: As I understood, at the last hearing on December 2nd your Honor finally requested that each of us submit to your Honor suggestions of what we thought should go to the jury, stating that they might be of some assistance to you, and your Honor would then decide what you would do with the case.

The Court: If it would be agreeable to you I might state to you what my idea is, or you could present anything additional.

Mr. Lasky: We have presented our views. I think it is now up to your Honor.

The Court: I, of course, had considerable to do with this case on the motion for summary judg-

ment. I denied the motion for summary judgment because it seemed as if there might be lurking in the case some matter of weight of evidence, and in view of some of the decisions of our circuit court I felt it would be better to deny the motion and to have those matters determined preliminarily, that is, the matters that have to do with the statute of limitations.

Mr. Carr has submitted a memorandum in which he suggests the instructions to be given to the jury. I am not wholly in accord with that idea. I feel that this case, in so far as what is to be submitted to the jury is concerned, presents a very narrow issue, and that is the issue of the statute of limitations, the factual basis for determining the question of the statute of limitations. The court will, of course, have to determine whether or not this action is barred by the statute of limitations, but it will be guided in making that decision as to the question of fact by the decision of the jury on the question of fact. In my opinion it would be error to permit anything to go to the jury except a very narrow question. The jury should not be concerned in this case with whether the defendants violated the Antitrust Law, whether they are good people or bad people, nor should the jury be concerned with who the plaintiff is, whether he is a good man or a bad man, whether he conducted himself properly or whether he had bouts with the law, or not.

You may think it is strange that I mentioned that, but to permit any extraneous matters to go to the jury would only result in the jury attempting

to bring to their aid matters that have nothing to do with the bare question of the statute of limitations. That is why I think the case should not be submitted to the jury on the theory suggested by Mr. Carr. I believe we have to treat this in the nature of a demurrer and the allegations of the complaint must be deemed to be true.

It would seem to me—and I am just stating this informally because this is a pre-trial conference—it would seem to me the court ought to say to the jury, “An action has been commenced in this court to recover damages for alleged breach of a statutory obligation, namely, the Sherman Antitrust Law, that the law gives a right to maintain such an action to any person who is aggrieved by violation of the Antitrust Statute, but the jury in this case is not concerned with whether or not there is or was such a violation of the statute. It is not concerned with the merits of the case at all; that the court has heretofore had presented to it the preliminary question as to whether or not this action is timely brought, and in connection with that an issue of fact has arisen and it has been decided to submit to the jury just the simple question of whether or not there is factually a timely action here, and that the jury will only be concerned with that issue, and the evidence will be limited strictly to that issue.”

I know that I can say this in the pre-trial conference. There isn't any jury present. Both of you are experienced lawyers. Perhaps it might be an advantage to Mr. Carr's side of the case for him to be able to talk about a violation of the Antitrust Law, and that might create in the minds of the

jury the idea that plaintiff should be permitted to proceed with his case and be heard. However, the statute of limitations is not a technical defense. There is a policy of the law behind it, and I believe the jury should be very strictly limited as to what it should consider in this case. I think—and this is just very informal and preliminary—that it would be sufficient if the jury, after being told generally the nature of this proceeding and why they are sitting in the box, and the reason for this special hearing, so that they may have their minds directed toward the essential issue to be presented, would be to tell them that their only function is to determine whether or not prior to the time within which the action could be brought the plaintiff knew or had reason to believe that it had a cause of action for violation of the Sherman Antitrust Law against the defendants in this case. That, it seems to me, if perhaps not precisely in that language, at least in language that would convey that idea to the jury, would be sufficient for the jury to go on, and then each side to limit itself.

It is a little difficult because there is a long history to this litigation and to these matters, but it seems to me if both sides cooperate, the issue can be intelligently and adequately presented to the jury, even though it is to be limited.

There is another question also that I think would have to be decided, and that is, who would go forward to present the evidence first on this issue?

Mr. Lasky: I think that since there is actually a claim of fraudulent concealment to evade the statute, the burden is on the plaintiff.

The Court: What do you think, Mr. Carr?

Mr. Carr: Any way your Honor wants.

The Court: Well——

Mr. Carr: We will take the burden. We will assume the burden.

The Court: It amounts to this: There must be a preponderance of evidence, according to all rules, to be borne by him who has the burden of proof. I will be glad to decide that unless you gentlemen can agree between yourselves as to that.

Mr. Carr: I think we should, because we are advancing facts which we claim tolled the statute of limitations, and I think that burden does rest with us.

The Court: As I see it, the evidence that you would present would be something of the same evidence that has been presented in support of the motion for summary judgment, wouldn't it?

Mr. Carr: I think so. Without any definite thought as to that question, it seems to me on the spur of the moment, and reserving the right to make different or amendatory statements, I think it is up to us to prove why we did not know of these violations, why we did not bring our suit before we brought our suit.

The Court: That is right.

Mr. Carr: We claim that the statute was tolled. Therefore, we should prove that within the purview of the decisions.

Mr. Lasky: I think that is correct.

Mr. Carr: That would give us the opening and also the closing. Frankly, that is what I want.

Mr. Beardsley: May I make a suggestion, if your Honor please? It occurs to me, your Honor, in view of the statement of the issue as stated by your Honor, and Mr. Carr's statement just now, that that still brings up the question of whether there was a violation. In other words, he wants to prove why he did not know of these violations, and as I took your Honor's statement of the question, all that might be presented is as to whether or not the plaintiff knew or had reason to believe that it had a cause of action. Now, that necessarily—and I think I am practically repeating your Honor's words—that necessarily involves the question as to whether there was a cause of action, and, after all, we cannot try the question of knowledge of there being a cause of action without trying the question whether there was a cause of action. Mr. Lasky presented a letter to your Honor. You have had nothing definite from myself or from my associates, but we are in complete accord with his statement. In that letter he stated that the issue to be tried is not whether they had a cause of action, but whether the plaintiff believed that he was damaged by the action of the defendant. The question of the plaintiff's belief—after all, that is the only question we can try without going into the merits, and if the plaintiff had the belief, then your Honor could decide, if the jury finds for the plaintiff——

The Court: If I may interrupt you there, I am assuming when I say a cause of action; of course, there would not be any cause of action unless there was damage. The statute does not give a private

individual the right to bring an action because somebody has violated the statute. I am a fellow who has a restaurant on Market Street. I cannot sue the borax company in a civil action for a breach of the Antitrust Law unless I have suffered as a result of it. So when I say, "had reason to believe he had a cause of action," inherent in that there is a cause of action that presented some reason for the plaintiff to bring the action.

Mr. Beardsley: How are we going to try in this proceeding the question as to whether they had a cause of action? I mean, how are we going to try the question of believing they had a cause of action without bringing in the question that there was a cause of action? As I understand Mr. Lasky's suggestion, in which we concur, it is that after all the statute is tolled if within the time the plaintiff believes it has been damaged by actions of the defendant. The question whether those actions were rightful or wrongful is not to be tried at this time. But if the plaintiff had that belief, it was his duty to proceed, and the statute was not tolled over the period he had that belief. We can try that issue without trying the question as to whether there was any justifiable foundation for the belief. But we cannot try the issue as to whether he believed he had a cause of action without trying the issue as to whether there was a cause of action. I am trying to express the view that I thought Mr. Lasky had expressed in his letter.

Mr. Carr: I would like to say this: If Mr. Beardsley will read the Pashley case, he will see

that that very question is discussed. The plaintiff knows that all these damages are happening to him, but he does not know he has a cause of action. He does not know he has a cause of action until he knows or finds out that the defendant has violated the law in some respect. The Pashley case is absolute on that, and also, not so strongly, but to the same point, this last Supreme Court case that we cited to your Honor.

Mr. Lasky: If your Honor please, as I understood you were only indicating roughly what the question would be, not being precise. Your Honor's question was whether prior to the time the plaintiff should have sued—and, of course, he can always select the date on that; I think October 10, 1939—the plaintiff knew or had reason to believe that he had a cause of action. Of course, the cause of action, as your Honor has just indicated, is composed of two elements: the violation of the Sherman Act and damage flowing from it. The plaintiff asserts he knew he was damaged by these price cuts and the so-called fraud order. He claims he did not know it was the result of a conspiracy, which would be the violation of the law. Your Honor has in the question, Did he have reason to believe? Suppose, as we contend the evidence will show, he did believe and was convinced—convinced in his own mind, I think is the way your Honor expressed it in a tentative way at the last hearing on December 2nd—and yet suppose the jury found he was convinced in his own mind that there was no good reason why he should be convinced in his own

mind? He believed, but there was no reason why he should have believed. Then where do we stand? It seems to me the question is, Did the plaintiff believe, or could he have believed——

Mr. Carr: When an injury comes to a man he can believe it is the result of the act of his adversary, but he may not know it. It is the knowledge and not the belief, and that is actually what the Pashley case and the case cited therein hold. If your Honor will read it you will see. It is a question of knowledge and not of belief. You believe the fellow damaged you or injured you, but you do not know that he did. You do not know that he did. You believe as the result of his action but you do not know it absolutely. The Pashley case and the case cited therein exactly cover that point.

Mr. Lasky: No.

Mr. Carr: Mr. Lasky, you read that other case that is cited and quoted at some length in the Pashley case.

Mr. Lasky: He cannot have knowledge of whether there was a violation. You can't ask the jury, Did this man have knowledge?

Mr. Carr: That is the only point.

Mr. Lasky: Mr. Carr, I would like to be heard.

Mr. Carr: Go on.

Mr. Lasky: The jury cannot say whether this man had knowledge of whether there was a violation or conspiracy under the Sherman Act until it is established that there was a violation. You cannot have knowledge of something that does not exist, and, of course, we contend it did not exist.

And yet that issue nobody wants to try at this time. That is the whole purpose of having a special trial. If you put it in terms of knowledge, you presuppose the existence. You can't put it in the form of "should he have had knowledge," because the only way you can prove that, or go into it, or ascertain it is to ascertain all the surrounding circumstances of what we did, which question would lead into a trial of the main case. We contended on our motion for summary judgment that the plaintiff actually believed he had been wronged. We went further. We said he was convinced in his own mind and still he did not sue. That is a simple question that the jury could answer "Yes" or "No," and your Honor would then be in a position to determine whether, as a matter of law, the case was or was not barred by the statute of limitations as a consequence of the jury's answer, whatever it may be. But it seems to me phrasing it in any other way leads directly into the main trial. I would not have any objection, and I do not think my associate would, to a question which would read, "Prior to October 10th, or whenever it was, did the plaintiff know, have reason to believe, or did believe that it had a cause of action?"

Mr. Carr: Not belief. You can always believe that your adversary acted, but until you know you have no cause of action.

The Court: What is the distinction between the use of the term "know" and "believe"?

Mr. Carr: If I may answer the question, if you believe, you may be convinced in your own mind

absolutely, but you have not the definite knowledge that the defendant did it. You may believe. You may be injured and you may believe that it was the result of the other automobile's negligence. But until you know whether he was over on the other side, on the wrong side of the road, you cannot——

The Court: It is still not clear to me what is the difference between the use of the term "believe" and "know."

Mr. Carr: I think there is a big difference.

Mr. Lasky: There is one difference. You can believe something that does not exist, but you cannot possibly know about it. In other words, you can believe that the defendants here conspired together, but if in fact they did not conspire together, which is our defense on the merits, you cannot know it, because you cannot know something that is not so. That is what concerns us so much about casting the question in the form of knowledge, because it presupposes existence.

The Court: I think what we really mean here is not the difference between belief and knowledge, at all. It is the question of something having been brought home. It is more in the nature of notice than knowledge, isn't it?

Mr. Carr: That is true, too.

The Court: All questions that involve the condition precedent of timely procedure have more to do with notice than anything else, isn't that true? If some fact is called to a person's attention but he takes no action with respect to the matter, he may lose his rights. What has been bothering me

a little bit about the matter—and that is why I have been informal in discussing it—is the question whether it is not so much a matter of belief or knowledge but more a question of facts being brought to the attention of a person which he either paid attention to or disregarded. Isn't that the nub of it?

Mr. Beardsley: In phrasing the question as your Honor did, it still comes down to the question of whether there was a wrong. You said, "Did he have notice of it?" That has the same element of determining whether there was something that entitled him to recover. It occurs to me that the surest way of trying the issue of the statute of limitations without involving the question of whether there was a violation of the act is on the question of belief, because if I believe I have a cause of action, yes, I must have the evidence. I may have to do a lot of digging around to get the evidence. I may have to take depositions. But that puts me on notice, and I can't sit by and let the statute run.

My belief is sufficient to toll the statute.

The Court: I agree with your analysis of it, but I do not think it is a question of belief. I think it is a question of merely a factual matter being brought to the attention of a person. There does not have to be any belief about it, at all. In other words, if someone told Mr. Burnham, and he had notice thereby, that there was a combination in restraint of trade in violation of the Antitrust Law between these defendants, and as a result of that his business was affected, that is sufficient to put him upon

the duty within a timely period of bringing his action. Isn't that correct?

Mr. Lasky: Your Honor has put a case where someone has told him of certain facts, and even though he does not believe he has a cause of action, he ought to do something about it. Suppose we have the reverse, where nobody has told him anything but he believes he has a cause of action. He believes it from circumstances, namely, that both companies cut their prices about the same time. Because of that he believes he has a cause of action, even though nobody told him anything; why isn't he still barred?

The Court: I was not intending to limit it to what anyone told him. I meant by any circumstance he was given notice, of course.

Mr. Lasky: My point, to carry it further, is if it is cast in that form of circumstance giving notice, the tables would be turned and the defendants would have to come into court and produce evidence of circumstances from which a jury on the main trial could conclude by circumstantial evidence that there had been in fact a conspiracy, because that is the only kind of notice he could have had from the circumstances, and certainly we should not be put in the position of having to prove by circumstantial evidence that there was a conspiracy or something from which you can deduce the existence of a conspiracy.

The Court: I believe on the motion for summary judgment the records in the Nevada Court were produced.

Mr. Carr: Yes.

The Court: Aren't there writings that would be more or less determinative of the matter, depending on how much weight——

Mr. Lasky: Yes, I think so, but there is this character of writing: Writings by Burnham to this person or that person, verified complaints, saying in firm language the defendants have violated the Antitrust Law to his damage, that he has consulted counsel, and counsel believe he has a cause of action, but he has not sued because he hasn't got the funds to carry it out.

Mr. Carr: That is not fair.

Mr. Lasky: I am not binding the court by what I say.

Mr. Carr: Don't say it unless you know it.

Mr. Lasky: I do know it, and it is absolutely true.

Mr. Carr: You haven't any such records. You have one letter.

The Court: It is assumed there may be something of that nature.

Mr. Lasky: That may be of that character, yes, which would establish, we think, his firm belief that he had a cause of action. And yet, suppose no evidence were produced that there was anything that put him on notice? I do not know what kind of evidence could be produced that would show he was put on notice.

The Court: According to what Mr. Carr said a moment ago, something along that line but leaving out part of it, I take it that there can't be any doubt that that being the document that was signed

by the man, I think from what Mr. Carr said the reason why he feels he has the burden in the case is that, having known about it, he contends that thereafter there was some kind of concealment of that matter which led him to believe that the so-called alleged unlawful acts had ceased, and he believes it is his burden to establish that concealment.

Mr. Carr: That the statute was tolled by the concealments.

Mr. Lasky: The only concealment that counsel has pleaded in his complaint was an alleged statement by Mr. Zebriskie which occurred prior to the dates of these documents we have referred to.

Mr. Carr: That is wrong. Paragraphs 75, 81(a) or 81(b) set forth that they concealed, that they hid the whole thing in their books and records.

Mr. Lasky: Now we come back to another question.

The Court: Yes. I would not submit that to the jury. I have read that all over. If there is any concealment it involves wholly, in my opinion, from what I have read of the briefs here alleged statements of Mr. Zebriskie. There is nothing else alleged except, as you have said, the matter of the books. I do not know how anyone can conceal anything by his own books.

Mr. Lasky: The documents we offered on the motion for summary judgment were certain documents dated before the alleged Zebriskie conversation and documents subsequent thereto, which, in our opinion, reaffirm the statements expressly made and those prior thereto.

Mr. Carr: Yes, but a lot of them were left out. In view of the affidavit that he had seen Zebriskie, we withdrew all of those allegations in the complaint.

Mr. Lasky: That is a fair issue to go to the jury: Whether after Zebriskie's conversation he had the same state of mind as he had before, and as expressed in the previous documents. That would be a fair question. But it still comes down, I submit, to his state of mind.

Mr. Carr: It is not a state of mind. The Pashley case so holds.

The Court: If it was not a state of mind what else could it be?

Mr. Carr: I would ask when did he actually discover the conspiracy? That is the point we suggest in our suggested instructions. To our mind that encompasses the whole matter.

The Court: What do you mean when you say he actually discovered it?

Mr. Carr: When he found out that they had conspired.

The Court: What do you mean when you say he found out that they had conspired?

Mr. Carr: He discovered the conspiracy, and that is when the Government filed these suits here in 1944.

The Court: By the mere filing of the Government's suit he did not discover anything more than he had known, did he?

Mr. Carr: Yes, he did, your Honor. The fact of these meetings and these conspiracies were shown

by the allegations in the Government's complaint.

The Court: The allegations of the Government's complaint may have been untrue.

Mr. Carr: They pleaded to them.

The Court: That is a different question.

Mr. Carr: We will prove that they were true by their own writings.

The Court: Your contention really comes down to this: He did not discover the conspiracy until there was a plea——

Mr. Carr: No, until the Government charged it and certain letters were found here and certain documents, letters of these defendants that proved the conspiracy, and certain facts——

The Court: What you are saying there is he did not discover the proof of the conspiracy.

Mr. Carr: No, he did not discover the conspiracy, your Honor. He knew nothing of the conspiracy. He might have thought these people were hurting him individually and yet had no proof of a violation. The violation of sections 1 and 2 rests in the conspiracy.

Mr. Lasky: You say now he might have believed they were acting individually. That we think is a fair question that should go to the jury: whether he believed that he had been damaged, not by their act individually, but by their acts violating the Sherman Antitrust Act.

I would like to make two statements: First, the Government's suit makes allegations about meetings which had occurred long after the plaintiff was out of business, and there is nothing in that com-

plaint in language or in the criminal indictment referring to any events prior to the fall of 1939. But more important than that, it seems to me, Mr. Carr's presentation is vitiated by an essential fault. This is not a case where the statute of limitations would not begin to run by discovery, using that term in the general sense. This is a case where it begins to run automatically when the wrong was committed, but it may be tolled by fraudulent concealment. In other words, it is not a suit to determine when the statute began to run; it is a suit in which he invokes the fraudulent concealment to stop the running. That means there is no tolling of the statute unless he has been led by the fraudulent concealment to desist from doing something. That means he must rely on some things Zebriskie told him. If he in fact did not believe what Zebriskie told him, or if he believed Zebriske for a while and then he came back to his former belief that there was a wrong, a violation of the Sherman Act to his damage, then he has not been led by a fraudulent concealment to desist from doing anything, and we are back to where we were in the beginning, namely, the statute of limitations has run.

So it is not a question of discovery, at all. He still may know nothing. But as long as he does not believe Zebriskie, there is no fraudulent concealment. If Zebriskie said, "We did not violate the law," and Burnham said, "I do not believe a word you told me," the contention that the Zebriskie conversation was a fraudulent concealment would pass out of the case and it would be wholly important

whether any fact was ever called to his attention which would put a reasonable man on notice. I submit that would be a sound analysis, and if that be true, it comes back again entirely to Burnham's state of mind. In our proposed question we used the word "believe." It may be any other word. Your Honor tentatively used the phrase "convinced in his own mind" in our December 2nd conversation. Any other form of expression which would bring out the same thought of state of mind would serve our purpose, I believe.

Mr. Carr: Very nicely, but that is not the law. We are perfectly willing that your Honor form any expression you desire after reading the Pashley case and the cases cited therein, the Kimball case, the Pashley case, the other California cases, and also the last case in the Supreme Court, the one which we cited to you. We are perfectly willing that your Honor make whatever instructions your Honor would think, subject to our objections and exceptions.

Mr. Lasky: On the basis of the briefs and these letters I have written, the defendants are willing that your Honor frame the question, reserving the right to object or except to any question we think is improper.

Mr. Carr: If we are getting into a metaphysical discussion before the jury as to belief and knowledge, it might be better to try the whole case.

Mr. Lasky: I trust it will not be necessary to get into such discussions before the jury.

Mr. Carr: That is what your question would present. If your Honor would read the Pashley case——

The Court: I am familiar with that. We have a different problem here. We have a problem of framing an issue before the jury. If the court were deciding the matter, it would make it much simpler, but you are entitled to a trial by jury on an issue of fact, and we are now confronted with the problem of limiting the issue so we won't have the jury deciding the case on some small basis or by the introduction of extraneous matters. It therefore becomes very much more difficult to frame an issue that will assist the jury to justly decide an issue upon only the facts that pertain to that issue, and if we do not frame it properly, all it means is, no matter which way it goes, it will be just expensive litigation for everyone concerned from then on, because if the jury decides against the plaintiff in the matter and we have not framed the issue properly, he is going to review the matter, and then eventually the case may have to come back to be retried on that issue again, and if, on the other hand, the jury decides in favor of the plaintiff and we go ahead and try the case, it may go back again because of the fact that on the issue of the statute of limitations, the issue was not properly framed to the jury; so it becomes very important, in the natural enthusiasm that each side has for its case, to get the query framed in the most favorable way to his side, there may be a disservice to the man who propounded that idea, because it would not be the end of the matter.

If there is a framing of the issue in a way that is favorable to one side or the other and a corresponding favorable result obtained from the jury, it will be knocked out later on the basis that it was not a correct and a just framing of the issue. So it becomes somewhat different along that line.

Mr. Carr: It does, and for that reason I am perfectly willing to leave to your Honor, reserving of course our right to an exception, the preparation of this question. You have had both of our views. That is what you asked for in the beginning. And then you stated possibly they would be of some help to you. All we ask is that your Honor read the Pashley and similar cases cited, and then make your ruling. The question is now down to the difference between the words "believe, knew and knowledge," and that is what your Honor is going to have to pass upon.

The Court: Perhaps I had better take a few days longer and frame something in writing on this matter, so you will know how to govern yourselves.

Mr. Lasky: When you have done so I might suggest it could well be put in a pre-trial order so that both sides know where they are headed for.

The Court: I think so. I think, I will make a pre-trial order saying, "The issue to be presented to the jury is such and such," and the court will fix the precise query to be presented to the jury, so each side can know the limits of the evidence that it will be called upon to present.

Mr. Carr: Will your Honor now set the case?

Mr. Lasky: On that may I be heard a moment? I submit it would be better to defer setting the case until your Honor has framed the issue, because depending on the scope of the issue we would know how much time we would need.

The Court: Suppose you tell me about when you would like to try the case?

Mr. Carr: We would like to try the case at the first earliest date after the 1st of March. It was originally set for February 4th. Mr. Lasky called me and said he had to go east and remain there for thirty days for various purposes. I told him it would be agreeable, provided it was not continued for longer than thirty days.

Mr. Lasky: What counsel says is quite correct. I go east on the 18th of January. I have a case before the United States Supreme Court on the 5th of February, and I will be back here about the 10th of February.

The Court: You had probably better count on a few days more.

Mr. Lasky: Since some time in November we have been trying to get Mr. Burnham's deposition.

Mr. Carr: You never spoke about that until our conference.

Mr. Lasky: I spoke to you on November 18th in this courtroom.

Mr. Carr: We have tried to suit your convenience in the matter, and I even wrote to him asking him to come back earlier, which he agreed to do until you thought you would not be here.

Mr. Lasky: He would not have been back, as I understand it, until the 20th of January, if the Court please, two days after I go to Washington. Mr. Aitken will come here for the deposition. After we take the deposition it may be necessary for us to take depositions back east. We do not know until we have his deposition.

Mr. Carr: We ask that your Honor set the case definitely. It has been dragging along here, and we think we are entitled to an early trial, as early as your Honor's convenience would permit.

The Court: How long do you think, if we properly limit the issues, it would take to try the case?

Mr. Lasky: If it is limited, as I think the case should be limited, I think the case could be tried before the jury—I am just guessing—in two days, at the most.

Mr. Carr: I think three. I think we could finish it in three.

The Court: You are both agreeable to setting it some time in March?

Mr. Lasky: Yes, I think so, and we would suggest on our part toward the latter part.

Mr. Carr: We would like to get as early a date as suits your Honor's convenience.

Mr. Lasky: Because we won't get Mr. Burnham's deposition until, roughly, the middle of February.

Mr. Carr: That is not his fault.

Mr. Lasky: It is partly his and partly ours.

Mr. Beardsley: I will take the fault. The fact is we haven't got it.

Mr. Lasky: Then after we have taken it we have to act accordingly.

Mr. Carr: We ask your Honor to set it as early in March as your Honor's convenience will permit.

The Court: I have had to re-set a number of admiralty cases, which are entitled to some precedence, because of the fact that I was engaged in this Alcatraz Penitentiary case, and about ten of those cases had to be re-set.

Mr. Carr: We know that.

The Court: It will have to be in the latter part of March.

Mr. Carr: Very well, your Honor. Whenever your Honor's convenience permits the setting of it is perfectly agreeable to us.

The Court: I will set it for the 25th of March. That is a Tuesday.

Mr. Carr: Thank you, your Honor.

The Court: And I will file a written memorandum in the next week, during the course of this week, perhaps.

Certificate of Reporter

I, J. J. Sweeney, Official Reporter, certify that the foregoing 27 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting, to the best of my ability.

/s/ J. J. SWEENEY.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Monday, December 2, 1946

2:00 o'Clock P.M.

The Clerk: Burnham vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready, your Honor.

The Court: Proceed.

Mr. Harrison: We ask your Honor for this conference not only for the purpose of pursuing the relief ordinarily obtainable on a pre-trial conference, but also because of certain special difficulties that seem to us to be involved on a separate trial of this issue. In the stipulation which was entered into by the parties when the question arose as to whether a motion to dismiss should be regarded as a motion for summary judgment, and where in it was agreed between the parties that the motion before the Court should be so treated with leave to the plaintiff to file additional affidavit, it was provided that in the event that both the motion to dismiss and the motion for summary judgment are denied this stipulation shall be without prejudice to plaintiff's right to apply for a separate trial of the issue of the statute of limitations or any other issue under Rule 42 of the Rules of Civil Procedure, and it shall be without prejudice of any right of any defendant to oppose any such trial, and we reserve the right to oppose any separate trial, because we concede there might be difficulties with regard to a separate trial.

Thereupon the motions to dismiss and the motions for summary judgment were argued at length before your Honor, and your Honor handed down an opinion denying the motions for a summary judgment and reserving the ruling on the motions to dismiss which was based on the statute of limitations.

In that opinion of September 20 of this year you Honor stated:

“The issue of the statute of limitations, however, should be resolved preliminarily upon a separate trial. Rule 42(b) Rules of Civil Procedure:

“I am of the opinion that the interests of justice and of the parties will best be served if this issue is determined before litigating the larger issues involved in the merits of the controversy.”

Your Honor then gave the defendants permission to file answer on the merits within ten days after setting up the defense of the statute of limitations; and thereupon, either side may move the Court to set the special issues for trial.

Your Honor stated:

“The time of defendants to answer on the merits is extended to a date ten days after the determination of the special issue, if the same is decided adversely to them.”

At the last hearing of this matter your Honor set the trial of the special issue for February 4.

Now, if the Court please, to refresh your Honor's recollection on still another matter which will at once come to your Honor's mind, our original motion here based on the statute of limitations was in part a motion to dismiss on the face of the complaint; in other words, it was grounded on the proposition on the face of the complaint the cause of action was barred by the statute. We also added pursuant to this stipulation a motion for summary judgment on the ground that facts shown by affidavit showed beyond the possibility of question that irrespective of all other questions in the case it was demonstrated that the plaintiff knew—and in the meantime the statutory period began—and believed that the cause of action existed and that therefore whatever view might be taken of the motion to dismiss, upon that ground that, as I say, the plaintiff knew and believed that he had a cause of action, the motion for a summary judgment should be entered.

Your Honor took the view that a summary judgment should not be entered and reserved the matter of the ruling on the motion to dismiss.

The plaintiff has demanded a jury trial. I might say at the outset that we entertain some doubt as to whether there is a right to a jury trial as far as the issues here presented are concerned. So we do wish to state at the present time that we are not consenting to a jury trial, because in proceeding without making that statement it might be deemed we were consenting to a jury trial, as a matter of law under Rule 39(c); but the essential difficulty

about a defense on the statute of limitations arises from the nature of the facts that are relied on by the plaintiff to obviate the period of the statute of limitations. If the issue were one being tried before your Honor those difficulties would not be so serious. In other words, if we were before your Honor on the issue, "Did the plaintiff believe more than three years before 1942 that a cause of action under the Sherman Antitrust Act existed?" your Honor could determine that question with a mind judicially trained and apart from the issues in the case; but when it comes to submitting an issue of that kind to the jury we have here the situation where upon the face of the complaint, and unless some excuse be shown, the cause of action is barred.

We assume that your Honor would rule, because there has been no question raised on the point seriously by the other side, but we are confident of our position at any rate if such a question is raised, that the statutory period is three years requiring a suit within that time. Also, the cause of action here is a cause of action which arises from injury done to the plaintiff as the result of an infringement of the Sherman Antitrust Act directed against him and that, therefore, as to one item of damage set forth in the complaint, to-wit, the destruction of the plaintiff's mail business by reason of the mail fraud order in 1924 which is alleged to have destroyed that particular phase of his business in 1924, the period of the statute would run from 1924 or 1925, when that injury occurred.

As to the injury alleged in the complaint with respect to the price cuts where it is alleged that by reason of certain price cuts in the year 1928 the plaintiff's business was wholly destroyed in 1929, we would expect your Honor, and I assume your Honor would rule that in the absence of some excuse the period of three years would begin to run from that time. Now, then, it would be that issue that would be presented to the jury or to your Honor.

We are conscious of the fact that your Honor had in mind in making this order trying to avoid the unnecessary expense of a long trial if the case can be disposed of in a short hearing. That necessarily means, and your Honor so indicated in your opinion, that the question of the larger issues, as your Honor described them, the question of whether the defendants were guilty of a conspiracy in violation of the Sherman Antitrust law would not be expected to be tried in this preliminary hearing. Obviously, if we had to go into those issues the trial would be extremely long and no time would be saved and there would be no purpose in having the preliminary trial upon the special issue.

Now, the peculiar fact about this case is that the issues here involved, if tried in full, and if the jury is called upon to render a general verdict as to whether this cause of action is or is not barred by the statute of limitations will necessarily involve the trial of those larger issues. To indicate what I have in mind, the complaint alleges definitely that these acts were done and that plaintiff suffered cer-

tain damage in 1925, that certain other acts were done in 1928, as the result of which he was put out of business in 1928. To obviate the bar of the statute—because if nothing more were said the complaint of course should be dismissed on the ground that upon its face it is barred—the plaintiff alleges, and we have denied by this special answer, in Paragraph 75 of the complaint what seems to be the main ground and it seems to us clear the only tenable ground for voiding the bar of the statute:

“That in May, 1929, said Burnham called upon C. B. Zebriskie, the manager of defendant, Pacific Coast Borax Company, at its office in New York City, and protested against the said cuts by defendants in the price of borax and charged said defendants with so doing for the purpose of eliminating, and with the intent so to do, plaintiff from its operations at Searles Lake and from any competition with the products of defendants; that at said time Zebriskie denied the said charges of said Burnham and claimed that such cuts were made solely by reason of the discovery kernite at the Kramer Borax Fields in Kern County, California, (and which discovery and development is more particularly hereinafter set forth and described), and further stated that defendants had no desire or intention to injury or damage plaintiff; that said Burnham and said plaintiff, believing the statement of said Zebriskie as to the good faith of defendants and the lack of

their desire to injure plaintiff, accepted said statement of said Zebriskie as being true; that in truth and fact said statements of said Zebriskie were false and fraudulent and made with the intent and for the purpose of lulling plaintiff into inactivity and in a further endeavor to eliminate plaintiff as a competitor; that the falsity of said statements was not discovered by plaintiff or its officers until on or about the fall of 1944."

Your Honor will see that the only reliance in the original complaint upon any facts which would obviate the bar of the statute is the reliance upon a statement by an officer of one of the defendants which is said to be false and fraudulent. Our defense could not be eliminated unless it were proved in the first place that Zebriskie made such a statement, and in the second place that if he did make it that the statement was false and it was made fraudulently and with intent to deceive. Then, of course, it would have to be shown also that the plaintiff believed the statement and believed that the price cuts were not the result of any activity prohibited by the Sherman Act. If it were merely proved that the defendant made the statement and plaintiff believed the statement and did not believe he had a cause of action the excuse would not be established.

The Court: This was 1929?

Mr. Harrison: Yes.

The Court: That was the same year the defendant went out of business?

Mr. Harrison: This was in May of the same year. The defendant went out of business in January. I am not speaking for the moment about the question of law which will be presented to your Honor sooner or later, and we think, inevitably on the trial as to whether or not a protestation of innocence by a defendant of wrongdoing can be relied on under any circumstances so as to excuse known action of the plaintiff. But assume for the moment this is an excuse, what question can be presented to the Jury if the plaintiff states that this dead man gave him this assurance that they were innocent of intent to harm him and conspire, and so forth, if the jury believes that, then the jury is next confronted with this: Was it a fraudulent statement made with intent to deceive, and neither the jury nor the Court can reach a conclusion on that issue without deciding whether or not we were guilty of a conspiracy. If we were not guilty of a conspiracy then this is no excuse at all. And the defendant could not safely go before a jury, or the defendant could not safely go before your Honor on the general issue of statute of limitations without presenting his evidence, that if this dead man Zebriskie made the statement, it was perfectly true, or that Zebriskie made it in good faith, and the only way we could establish that would be by showing that in fact we were not guilty of any conspiracy, that in fact we had not agreed with the other defendants to injure this plaintiff, that in fact we had not agreed to monopolize the business and deal this plaintiff out.

Now, of course, on a general trial all of those issues would be before the jury, the statute of limitations and the evidence on the main issue; but if this issue is to be tried separately it would seem that the only question as to which your Honor can get any help from the jury is by way of answer to the complaint as to whether the plaintiff believed after Zebriskie made the statement to him, if he did, whether he would still believe he had a cause of action.

The Court: I think the only question on the statute of limitations, the only matter that the jury or trier of the facts can determine is just a question of credibility and weight of the evidence. Otherwise, I felt I could have really decided this matter on a motion for summary judgment, but there lurked in it matter of weight and credibility of some evidence connected with the issue of the statute of limitations. I have been told once before by the Circuit Court of Appeals that I should not decide a motion for summary judgment when that came up, and in fact they do not seem to like the judges to do that. So I thought it would be best under the circumstances to let either the Court or the jury, as the case may be, say how much weight is to be attached to this man's testimony, or that piece of evidence, and to follow along on that basis. But I do not feel that the trial on the statute of limitations issue in this case should wander all over the main case. It should be precisely limited to what would go to toll the statute of limitations.

Mr. Harrison: I quite agree with your Honor, and because we feel so strongly about that question and the danger of its wandering, that our summation is that what should be submitted to the jury in this case is not the general issue of the statute of limitations, because if the general issue of the statute of limitations is submitted to the jury as such, then it will necessarily and inevitably involve the determination of those main issues that I think we would all agree it is desirable to keep away from.

Now, let me call your Honor's attention to——

The Court: If I may interrupt, I think perhaps you are right about that, that perhaps it would be better to frame an issue for the jury so that both sides can be guided by it, and it could be really determined as to the precise question we will submit. Otherwise, both of you would be disappointed in the result, no matter which way it went.

Mr. Harrison: What your Honor has in mind, I assume, was that there was some issue of fact which might involve the question of weighing the evidence or credibility of witnesses, or the weight to be attached to testimony. Now, as a matter of fact, the only question as to which there could have been any conflict on the motion for a summary judgment was the state of mind of the plaintiff: Did he believe that he had a cause of action back in 1930 or 1931? If he did believe at that time, truly believed he had a cause of action under the Sherman Antitrust law, why, of course, he was out of line, but, on the contrary, in spite of the documentary evidence——

The Court: You are referring now to the Nevada litigation?

Mr. Harrison: Yes, I am referring to that as being, in the words of your Honor, persuasive evidence, but in your Honor's view, not conclusive. If that convinces the trier of the fact, whether Court or jury, if at that time he believed he had a cause of action against the defendants, why surely, nothing else matters and the issue is disposed of; but the point I am making is this, that the question to be put to the jury should be specific rather than the general issue of the statute of limitations.

Now, I call your Honor's attention in that connection to Rule 49(a):

“The Court may require a jury to return only a special verdict in the form of a special written finding upon each issue of fact. In that event the Court may submit to the jury written questions susceptible of categorical or other brief answer, or may submit written forms of the several special findings which might properly be made under the pleadings and evidence.”

The Court: Have you prepared some forms?

Mr. Harrison: I have some forms, but they are not in final form. I should say one of the questions which ought to be submitted to the jury under the pleading is, “Did Zebriskie in May, 1929, make the statement alleged in Paragraph 75 of the complaint?”

Secondly:

“Did the plaintiff believe at any time after Zebriskie’s statement that the defendants had violated the antitrust laws to plaintiff’s damage?”

Three:

“Did the plaintiff have this belief after Zebriskie’s statement and before October 10, 1939?”

That date, if your Honor please, October 10, 1939, is years before the statute was extended by act of Congress.

Fourth:

“Did plaintiff refrain from suing before he did sue because of, or in reliance upon Zebriskie’s statements?”

Five:

“Was his reason for not suing lack of funds?”

The Court: That last one is argumentative, I suppose.

Mr. Harrison: All right. These are only suggestions, if your Honor please, but they indicate the nature of the questions to be submitted to the jury. I am not prepared to say that we could not improve on those, but I am indicating what we have in mind.

Now, let us take one other question, and that is the question of the allegations of Paragraphs 81(a) and 81(b), which were added by amendment to the

complaint. Your Honor will remember there were general statements in the amendment to the complaint alleging, in the first place, lack of knowledge of the offenses charged, which we believe to be legally immaterial, and also alleging that the defendants had altered their records so as to conceal—and it was just about that brief—so as to conceal the conspiracy.

There again you have a case where, if the general issue were submitted in general form to the jury, the jury could not find there had been any concealment or a conspiracy, unless they were convinced there was a conspiracy. There is no indication as to the nature of the things that were concealed. There is no statement that the concealment occurred before the statute had run, and certainly the concealment would be immaterial if the statute had already run. There is no statement nor any claim that the plaintiff was prevented by the concealment from gaining a knowledge of the facts and that it was a trick or device which operated against him, that he ever sought to look at any records or papers or documents. So that until some claim is made, until the issue is defined as it was claimed in that respect, it is difficult to see how you can get any specific question beyond the question as to whether the plaintiff believed at any time before October 10, 1939, that he had a cause of action against the defendants under the antitrust law. I don't see how he can at this time define a specific question on that because there has been no specific claim. We don't know what we are talking about at this juncture,

and we won't know until the plaintiff indicates, but certain as a matter of law we ask your Honor to rule that a change in the books or concealment or destruction of records or any act of that kind which did not come to the plaintiff's attention, which did not interfere with any inquiries of his and which had nothing to do with his investigation, if any, cannot have any effect on the case.

The Court: I don't think there would be very much question about that as a matter of law.

Mr. Harrison: And also, once the statute of limitations had fully run, the act of concealment would be immaterial, and I believe the cases are fully in accord with that.

The Court: I am somewhat impressed with the necessity of submitting some specific inquiry or inquiries to the jury so that we don't convert this trial of a special issue into a trial of the case, Mr. Carr.

Mr. Carr: I agree with you fully. That is perfectly agreeable. I am convinced when the time comes your Honor will so do.

Let me say preliminarily that this is an attempt on the part of Mr. Harrison and counsel to rear-gue, and by a very able argument, these matters that have already been submitted to your Honor on this question of the right of the defendants to claim the statute of limitations.

Now, what has happened here, as we see the situation, is this: We are suing under Section 15, the treble damage section, and that section provides that anyone injured by a violation of Sections 1 and 2

of the Act can sue for these treble damages. There is no question but what on the bare statement of all the facts, the statute would have run unless we did allege and prove some excusatory facts.

The law of the State of California is that in the case of fraud of this character, or not only in case of fraud, but of deception and concealment, the statute does not begin to run until discovery. Now, our position is this: When were we charged with this discovery? When did we make this discovery of this conspiracy and of these charged actions of the defendants? We contend that we, of course, did not know of the real facts of the case until the Government brought its action here in 1944, and that while we knew we were being pushed around and kicked around by these people, we had no knowledge of the conspiracy. The real basis of our cause of action, as we have stated to your Honor before, was the violation of Section 1 and 2, which is a conspiracy to monopolize, or a conspiracy in restraint of trade.

The Court: Then, you say the question on the statute of limitations issue is a factual decision of the factual question as to when the plaintiff actually discovered the alleged conspiracy?

Mr. Carr: Yes, your Honor.

The Court: So that then could not we submit some inquiry to the jury substantially to this effect:

“Did the plaintiff actually discover or notice the alleged antitrust conspiracy prior to October 10, 1939?”

Mr. Carr: Subject to the correct date, but what we believe, your Honor, is this, that the matter stands, and it is our position that unless we can make good our excusatory allegations, of course, the statute will have run, but as we see it, the situation is this: There are three things that must be considered as to the plaintiff: "Did the plaintiff have actual knowledge of its intent to conspire and to injure?"

Of course, the answer here is "No, they did not," and secondly——

The Court: Isn't that the question that has to be determined, that is, as to the time element on this particular?

Mr. Carr: Yes, the question is, first, did we have actual knowledge, and secondly——

The Court: And secondly, when did you acquire it?

Mr. Carr: And secondly, when did we put on notice of these claims of malfactions? And, third, when did we actually discover these situations of which we complain?

The Court: Doesn't that simmer down to the one question to be submitted to the jury, because the one question that we have to determine in this case is a time question.

Mr. Carr: Not entirely, no, your Honor.

The Court: The statute of limitations means time.

Mr. Carr: Yes, it does, but the point of beginning of that time is important.

The Court: But isn't the ultimate inquiry the time in question for the jury to determine, when did the plaintiff acquire the knowledge or notice of the alleged conspiracy that he complains of in his complaint?

Mr. Carr: That is it exactly.

The Court: And if the jury answers that question as to any date prior to October, 1939, why, then, the judgment of the Court will be that the action is barred by the statute of limitations.

Mr. Carr: No, your Honor, that is just what counsel is endeavoring to have your Honor come to the conclusion, but that is not correct, because, for instance, the first question is, did we have actual knowledge of this conspiracy? Then, the next question arises: Were we put on knowledge of this conspiracy, and if so, when? Because the statute would then begin to run from that period against us, and if we were not put on knowledge of it, then after that comes the question: Did we exercise reasonable and proper diligence to discover the facts?

Those are the provisions and holdings of these California cases which have been cited to your Honor.

We are chargeable with that statute, may it please your Honor, from the date when we were put on notice, and if we sat down and did nothing at that time, why, we would be chargeable from that time; but if we pursued in good faith an inquiry into the facts and did not discover the real existence of such facts until the subsequent date, the discovery would be, or period of time in which the statute would be-

gin to run would be from that date. I don't think there can be any question of that under the California cases as to the tolling of the statute by fraud.

The Court: Do you think that more than one inquiry is necessary to be made of the jury?

Mr. Carr: Yes, I think your Honor would ultimately give to the Jury three questions:

"1. Did the plaintiff have actual knowledge of this claimed conspiracy within three years prior to the commencement of the action?"

Then if the answer to that is "No," then comes the question:

"2. When was the plaintiff put on notice as to the existence of such a conspiracy?"

And from the date the statute would begin to run.

The question of whether or not the plaintiff exercised due diligence as to the discovery of the facts would then be submitted, and then the question:

"3. When did plaintiff discover the real facts?"

Then the next question might be this:

"Did the plaintiff use due diligence in the discovery of these facts subsequent to the date when he was put upon notice?"

That is the law, if I may so boldly state it to your Honor, as set forth in those California cases. If we have no facts which put us on notice of this conspiracy or intent to damage, we of course are not chargeable with the statute. It is disclosed a suspicion arises—take the Nevada case—from the day

from which our suspicion arises we must then use due diligence and every diligence possible within our power to discover the facts, and then the statute is tolled if we are in good faith examining into the facts until the date of discovery, and there, of course, could be no action without discovery.

I would like to state also preliminarily that there was no objection as to a motion for jury trial or demand for a jury trial. There was no objection to the setting of this matter as a separate trial on the question of the statute. I think if my memory serves me correctly that in Counsel's brief, they asked if your Honor should deny the motion that a separate trial be given on the statute of limitations.

The Court: Mr. Harrison was not making that point. He was making the point he had not consented to a jury determination at any time.

Mr. Carr: But he was also raising this as a new point, too, to the effect, after all they had never consented to the separate trial, but of course, they had.

The Court: I did not understand him to say that.

Mr. Carr: If I am in error I ask your pardon.

The Court: I understood him to say that he had not consented at any time to a jury determination, isn't that right?

Mr. Harrison: I think Mr. Carr is right to this extent, that we never did stipulate nor request a separate trial of this issue.

The Court: I understood that.

Mr. Harrison: Your Honor has ordered it and we are complying.

Mr. Carr: In your preparation I recalled your suggesting—let me put it that way—your suggesting that if his Honor should decide the motion, the question of the statute should go to separate trial, but I wanted to bring home to your Honor at this time that it is a reargument that was given by Mr. Harrison today on all of the questions that have been presented to your Honor. Our only defense to the statute of limitations is the excusatory allegations which we have in our complaint and coming under those California cases of fraud and concealment.

Now, your Honor has given them the privilege to plead specially as to this, and that they have done. They have denied those three paragraphs of our complaint, Paragraphs 75, 80 and 81.

The Court: That has to do with the so-called Zebriskie incident?

Mr. Carr: Yes, your Honor, and the concealment, and I would like to raise one more point here just so Mr. Harrison and counsel will be advised. I think, if you will notice in the answer they do not deny the allegations in reference to Zebriskie. All they say in their answer is they have no knowledge of whether it is true or not, but they don't deny it on that ground. I think if you will examine that, you will find that is a fact.

The Court: That man is dead.

Mr. Harrison: That is an answer.

Mr. Carr: But you don't deny it. You say you have no information or belief, but you don't deny it.

The Court: You mean that he places his denial on that ground?

Mr. Carr: But there is no denial. I am perfectly willing to let it stand as it is, and if counsel is satisfied, I am, but I merely made that point here so I did not take Counsel by surprise at the trial. So, our suggestion or thought on this procedure, your Honor, is that the issues are now raised. The statute has been pleaded in many different ways and through many different sections. They have also denied what they term the "excusatory," or what we would designate the "excusatory" allegations of our complaint.

Now, we therefore go to trial with an admission of all of the allegations of our complaint except the denial as to these three paragraphs, so what the jury would have, what your Honor would say to the jury is, "For purposes of this proceeding alone all of the allegations of the complaint except these three paragraphs are admitted."

The Court: I would not want to do that, Mr. Carr.

Mr. Carr: But they admit all the allegations by the motions and by the pleas.

The Court: No——

Mr. Harrison: No, we do not.

Mr. Carr: I can give you many cases on that——

The Court: That may be a matter of pleading, but on the question of the trial of the special issue,

I am going to submit only an issue of fact. I am not going to tell the jury that there was a conspiracy in this case.

Mr. Carr: No, you don't tell them that.

The Court: Or permits them to have that inference. I will restrict them to the determination of the knowledge of the plaintiff, because that is the only question of the statute of limitations that is involved.

Mr. Carr: A motion to dismiss is in the nature of a demurrer, and for the purpose of the motion the allegations of the bill must be taken as true. There are many cases on that point, both state and federal, which I would be glad to give to your Honor. But your Honor, irrespective of that, can protect the rights of the defendants by telling them the statute of limitations as pleaded by the defense admits for purposes of the statute only, which is true, the allegations of the complaint. Now, what the statute means and what they mean by pleading it is that, granting for the sake of argument that all of the allegations of the complaint are true, still it is barred by the statute.

The Court: Maybe you gentlemen could exchange suggestions between one another as to the questions to be submitted. I don't think we should give even as many as you have suggested to the jury, because it gets too confused. You have to limit matters so far as the jury is concerned. I think if you could work out, if possible, one, or perhaps two inquiries to the jury, which would fairly limit the factual question to be determined, that

would be very helpful. Have you thought of exchanging each other's views?

Mr. Harrison: I will be glad to submit to Mr. Carr and to your Honor the minimum number of questions that ought to be submitted, but we will be in profound disagreement as to what the questions should be and we will have to come to your Honor for that.

The Court: We may run just a few minutes longer and I will take a five minute recess at this time.

(Recess.)

The Court: You may proceed.

Mr. Carr: I don't wish to prolong this unduly. As we see it, the sole question to be presented to the jury on this particular trial is, when did we have or should have had knowledge of this intent to combine and conspire? That is the only question that this jury has to get.

The Court: When is the case set for trial?

Mr. Carr: February 4.

The Court: That is two months or more.

Mr. Harrison: We would like to know in connection with some pre-trial conference, your Honor's attitude towards some of these questions, because that would guide us.

The Court: I think we should rather promptly decide the special issue to be presented to the jury and it would be my endeavor to explain to the jury, somewhat colloquially, the precise matter that they are called upon to determine and why they are

called upon to determine it. I think I should explain to the jury this action has been brought, and preliminarily to the determination of the merits of the controversy, the jury has been summoned to hear and to make a finding of fact as to the question of whether or not the plaintiff's action has been brought in time——

Mr. Carr: Whether we had or should have had knowledge.

The Court: Whether or not plaintiff's action has been brought in time, and in order to aid the Court in determining whether or not the plaintiff's action has been brought in time, it is necessary for the jury to decide one or more precise factual issues and that there will be evidence presented by both sides directed toward that precise, or those precise factual questions, and that it will be then presented with a question or two questions to answer, and they are not sitting in the box for the purpose of determining whether or not the plaintiff is right in his cause, or whether the defendant is right in his cause, but only to determine the precise matter of whether the plaintiff is in time or not. I am just ad libbing, but it would seem to me that some more carefully prepared statement submitted to the jury might keep them well within the boundaries of the precise matter that they have to determine, and therefore it would be important for us to frame these one or two—maybe there should be three, as I am not intending to limit them, but I do think the more we can limit them the more intelligent consideration we will get from the jury—it would be

important for us to frame these one or two or three inquiries, and I think I could frame them myself, but I hesitate to do that, because after all, it is your case, and if you could each submit inquiries, one or two or three, to me, and if you did not object too much, I would choose from those and work out my own inquiries and make that as sort of a decision on pre-trial, and give you notice of that beforehand so as to prepare your case for trial.

Mr. Harrison: I quite agree with all your Honor has said. It is true that in this case I know I have had some difficulty, and in talking with my associates have had some difficulty in determining just what the factual question should be, and it may be that a somewhat further discussion with your Honor after the suggestions have been made might be of some assistance in that connection.

For instance, Mr. Carr has made some suggestions, and I would like to be heard briefly as to what he said, with the hope that when we do submit those questions, you can decide what questions should be put. I think some progress would have been made this afternoon if your Honor reaches the conclusion that your Honor will submit factual questions and not the legal issue of the statute of limitations to the jury, and the issue of fact will be settled by your Honor at some subsequent date after we have each submitted the proposed questions.

Now, when Mr. Carr is finished, I would like to address your Honor on five or six matters.

Mr. Carr: Don't you think we'd better postpone this until we get into this? Why don't you propose the thoughts and suggestions you have and I will propose the thoughts and suggestions that I have?

The Court: If there is anything you feel you want to say to me, I would rather have you do it, because I don't know when I am going to have time to hear you again.

Mr. Harrison: I think our denial is good under the rules, and I don't think we suggested a separate trial, but your Honor ordered it, but we are trying to suggest something fair to the parties by way of separate trial, and if your Honor should conclude there should be something to the separate trial, your Honor could order it, but the question before the Court is, how can issues be framed to the jury that are fair? After all, this much is clear, and Mr. Carr admits it, damage occurred in January of 1929, and if it had not been for excusatory matters, the statute would have run three years after that date.

Mr. Carr: Right there is where we have been diametrically opposed from the beginning. We do not admit the statute begins to run from the date of damage, and you have been insisting on that always, and we say, "No, our cause of action arose out of the violations of Sections 1 and 2," that involved the question of intent of the matter. These instances to which you refer are merely a measure of damages. We technically had defenses from the date you formed your conspiracy.

Mr. Harrison: If the Court please, I won't charge Mr. Carr with any admission. I thought he had admitted and I thought the question before us was excuse that would prevent the statute from running. Our position is this, that when you have a violation of the Sherman Act, no matter how long it is continued, there is no cause of action until such time as that conspiracy impinges on the plaintiff's rights, and when it does, and when the damage has been done, the statute begins to run, and therefore, so far as the price cut is concerned, the statute began to run in January, 1929. We say further, and I am not charging Mr. Carr with admitting this, but the law is clear, once the statute begins to run, it begins to run wholly irrespective of the plaintiff's knowledge.

In this case we think it perfectly clear the statute began to run wholly irrespective of knowledge in January, 1929. To toll the statute, the plaintiff alleges a fraudulent statement in May of 1929, and we say it is a question of fact and an issue under the pleadings whether the statement was made. It is also an issue of fact very clearly presented by the affidavits, whether after the statement was made, and at any time prior to 1939, that plaintiff, notwithstanding the statement was made, nevertheless believed he had a cause of action. If either one of those two questions, if the first or second question is answered in the negative, that is determinative of the case, but it is not a question of knowledge, and if the interrogation is put to the jury in the form of knowledge, then we are assuming there was a conspiracy, and any summation of the case

to the jury which assumes our guilt on the issue of conspiracy is unfair to us.

Now, if the Court please, suppose your Honor tells the jury, "We will assume for purposes of the trial, although the matter will be tried later, we will assume there was a conspiracy as charged"; what follows from that? Once they find Zebriskie made the statement—Zebriskie is dead, of course, but once they find Zebriskie made the statement, then it will follow inevitably that they must assume and believe that the statement was false, having been made, or if it was made by a person having knowledge that it was fraudulently false and yet we would not have had the opportunity to show, as we could show, upon a full trial, that the statement was true or that it was made in good faith. So if the question is put in the form, "Did the plaintiff have knowledge?", or, "When did the plaintiff first have knowledge?", or, "Did the plaintiff discover?"—that assumes he had knowledge of a conspiracy which existed. It assumes he discovered something which existed, and then we are put before the jury in a prejudicial light of not only having violated the law, but also of having misstated our innocence, and having lied and of having deceived.

I submit, if the Court please, the issue of fact upon which the Court thought there might possibly be a conflict or different inferences as to the state of the plaintiff's mind, and that can be decided entirely apart from the merits of the case, or existence of a conspiracy—"Did he believe more than three years before 1942 at any time after the state-

ment was made, did he believe he had a cause of action?"

Do I make my point clear to your Honor?

If the issue is put as to notice on discovery on any theory that there was something to know or something to discover, then the jury must infer we were guilty of a conspiracy. We are entitled to know, before becoming precluded by the defense theory of statute of limitations, whether Zebriskie told the truth, and yet we are not allowed to go into the merits on the special issue.

Our contention is that the proper question to the jury in the light of the affidavits and so forth is whether the plaintiff believed after the Zebriskie statement was made and before 1939 that he had a cause of action against the defendant under the Sherman Antitrust law. If he had so believed, then his cause of action would be barred, and the jury verdict would be of help.

The Court: I follow you on that.

Mr. Carr: It is not a question of belief; it is a question of, did the plaintiff have knowledge, or should he have knowledge from the facts presented, then he believed, because he may have believed in his mind the conspiracy existed, but he didn't know it existed. Did he know or should he have known from the facts presented that this conspiracy existed? It is not a question of belief; it is a question of knowledge—did he know?

The Court: What is the difference between you on that? Mr. Harrison says, "Did he believe he had a cause of action?". That is the same as, "Did he know?".

Mr. Carr: No, he might believe, but he wouldn't know the facts.

The Court: How can a person believe he has a cause of action unless he had something to base that on?

Mr. Carr: No, he would not believe he had a cause of action, but he would believe that these defendants were not to be trusted, just as Burnham says, but the only question here is whether he had knowledge of the conspiracy which is the basis of the cause of action, or should he have known from all the facts that the combination existed. That is the real issue.

Has your Honor seen this comparatively late case of American Tobacco Company vs. the United States, cited in 66 Supreme Court Reporter 1125, and it was decided on June 10 of this year?

The Court: One of the last cases the Supreme Court decided.

Mr. Carr: And in it they quote 140 Fed. 2d., 416. There it lays down the rules and they cite:

“In order to fall within Section 2, the monopolist must have both the power to monopolize and the intent to.”

They go on to say that “to read the passage as demanding and specific intent makes no sense, for no monopolist monopolizes unconscious of what he is doing,” and that goes to our contention that the basis of our cause of action here is the conspiracy, the violation of Sections 1 and 2 of the Act.

The Court: Mr. Harrison says, "Did the plaintiff believe that the defendants were guilty of a conspiracy under the Antitrust law before October, 1939?"

Mr. Carr: No, belief is not knowledge. All the California cases on the tolling of the statute by fraud don't hold that.

The Court: What is it?

Mr. Carr: It is belief, not knowledge.

The Court: What is the difference between them?

Mr. Carr: A man might think a wrong is being done him, that these people are conspiring, that these people must have made an agreement among themselves, but knowing is another thing.

The Court: But suppose he says he knows in his own mind the defendant had a cause of action?

Mr. Carr: No, it is, did he know or should he have known he had a cause of action?

The Court: I might say to you that when I was in New York I got quite a description of the famous aluminum case. I spent some time with the district judge who decided the case and he showed me his library he accumulated in connection with the trial of the case. He told me the case had occupied some two years and the record he had, comprised without the exhibits in the case, some fifty-five thousand pages of transcript. He told me that he had kept the matter under advisement, studying the briefs and records, something in the neighborhood of a year, and then when he did decide the case, it took him nine days to read his opinion from the bench. He was reversed by Judge Learned Hand in the case.

I have a feeling of prejudice in favor of the district judges, and I think he really did the real spade-work in the case, even though there was a decision to the contrary. In that case he had to do a tremendous amount of work. It seems to me there is something wrong with our system in the administration of justice that a case has to take these three years in actual trial in court. It does not seem to me there is any controversy that should occupy a court that long.

Mr. Harrison: In submitting these questions I suppose your Honor has no objection to a brief comment.

The Court: No, but would you mind sending in the questions and briefly state your reasons in support of them as being proper inquiries to the jury, and questions which would elicit the factual result that would enable the Court to determine the factual situation?

Mr. Harrison: One other thing, as to questions of admissibility, your Honor may feel those are questions to be determined at the trial, but there may be no harm in suggesting to your Honor if the direct evidence to the particular point may be admissible, your Honor may indicate your view.

The Court: It is rather difficult to do that. I hesitate to make these academic rulings.

Mr. Harrison: This is a little different from the ordinary case because we have submitted affidavits. There are certain matters that if we have to meet, we will meet them.

The Court: Submit any controversial issue that should be submitted, and Mr. Carr will answer.

Mr. Harrison: Is it agreeable to Mr. Carr that we may take the deposition of the plaintiff, George Burnham, and that may be restricted to the statute of limitations, without prejudice to our right later to take it on the general issue?

Mr. Carr: Certainly, but he will not remain here until the middle of January.

Mr. Harrison: Can we take his deposition in the east?

Mr. Carr: No, I don't think so.

The Court: If you take his deposition in the middle of January that will be satisfactory.

I will take this matter under consideration and if I feel that I can intelligently make an order at that time I will do so, or I may even ask you to come out again.

Mr. Aitken: I am in a situation here where Mr. Beardsley is away on his honeymoon. I would want some opportunity to be here personally, or for Mr. Beardsley to be here.

Mr. Carr: We will help you every way we can.

Mr. Harrison: If Burnham will be back sooner we can dispose of the deposition.

Mr. Lasky: I will be east in January and I can take his deposition.

Mr. Carr: No, I want him here.

The Court: Well, at any rate, we will set this case down for pre-trial conference and to be reset on December 30 at two p.m.

Certificate of Reporter

I, F. J. Sherry, Official Reporter, certify that the foregoing 36 pages is a true and correct transcript of the matter therein contained as reported by me and thereafter reduced to typewriting to the best of my ability.

/s/ F. J. SHERRY.

[Title of District Court and Cause.]

REPORTER'S TRANSCRIPT

Wednesday, March 26, 1947

Counsel Appearing:

For Plaintiff: Stirling Carr, Esq.

For Defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, United States Borax Company: Messrs. Brobeck, Phleger & Harrison, by Maurice Harrison, Esq., and Moses Lasky, Esq.; and Paul Sandmeyer, Esq.

For Defendant American Potash & Chemical Corporation: Philip M. Aitken, Esq., and Charles A. Beardsley, Esq.

(A jury having been impaneled and sworn to try the above-entitled cause, an adjournment was taken until tomorrow, Thursday, March 27, 1947.) [1*]

*Page numbers appearing at top of page of Reporter's Certified Transcript of Record.

Thursday, March 27, 1947

10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

The Court: Before the taking of evidence and before statements are made by counsel in this case, the Court will give a preliminary statement and instruction to the jury in view of the special nature of the case and of the matter to be determined by the jury. The Court will do this mainly so that the jury may view the evidence to be presented in the proper setting and will more thoroughly understand the nature of the matter to be determined by the jury.

This is somewhat an unusual procedure, and for that reason I feel it necessary to do that. Each side in this case is represented by counsel who are experienced and able, and they will present their side of the case. The judge is impartial in the matter. What I have to say is not intended to indicate in any manner that I have any view with respect to what decision the jury should make in the case. I have no view on that subject. That is why the case is being submitted on the issue that it is being submitted to you on.

This suit was filed by the plaintiff on July 3, 1945. As you were advised at the time you were impaneled, the suit is by the Burnham Chemical Company, a corporation, as plaintiff, against Borax Consolidated, Ltd., and other named corporations.

The complaint alleges that the plaintiff corporation was damaged because of acts of the defendants in violation of the Federal Antitrust Laws. In gen-

eral, the Federal Antitrust Laws forbid combinations and agreements in restraint of trade and to control prices. The plaintiff in its complaint charges that such a combination or unlawful practice existed as between the defendant corporations, and that by virtue thereof the plaintiff in its business suffered damage.

That issue, however, is not to be decided by you in this case. You are not to determine who is right or who is wrong in the litigation, itself. You are not to decide that the plaintiff is right or that the plaintiff is wrong.

A question was raised preliminary as to whether or not this suit was brought within the time specified by law. That is a legal question for the court to determine. However, in order to aid the court in the determination of that question the court made an order that a certain question of fact should be determined by the jury. The order that the court made was that the following issue was to be submitted to the jury, and I am quoting now from the court's order:

“At any time from May 17, 1929 to October 10, 1939 did the plaintiff know or have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States?” [3]

After you have heard the evidence in this case you will be required to answer “Yes” or “No” to that inquiry. You will say either that the plaintiff did know or have cause to believe that its business

had been damaged by acts of the defendant, or you will say, "No" to that, depending upon the evidence that is presented to you on that subject. You are not to be concerned with what ruling the court will make as a result of your finding. That will be a matter of law for the court to determine. The issue, therefore, is a very limited one to be presented to you, and the evidence will therefore be limited to that precise question as to the knowledge or cause for belief on the part of the plaintiff that its business had been damaged by alleged acts of the defendants.

You will not be called upon to determine whether the defendants committed any acts in violation of the Antitrust Law or not, but solely the issue as to whether or not the plaintiff had knowledge or good cause to believe that the plaintiff had been damaged by alleged acts of the defendants.

Mr. Carr: In violation, may I add, of the Antitrust Laws.

The Court: I have already said that, Mr. Carr, in violation of the Antitrust Laws.

Now, it is just as important in civil cases as it is in criminal cases that extraneous matters be eliminated, because injustices can frequently be done by considerations given by a jury or a judge to matters that are not part of the issue that [4] the jury or the judge has to determine. It is equally as good law in civil cases as it is in criminal cases. Therefore, you are not to be swayed by sympathy on the one hand or by prejudice on the other hand. You are not to determine whether the plaintiff or

the defendants, respectively, are good people or bad people, or whether they did things that you like or you dislike, because to interpose in the case extraneous considerations of that kind would not be in the interest of justice, and if a verdict were rendered that could be said to be based upon that, the court would not accept it. I say that in order that you may understand that you just have a very simple, narrow issue to consider, and the court will, I am sure, with the co-operation of counsel on both sides, limit the evidence in the case to the very narrow and precise issue which I have stated to you.

I think that is all the court has to say to you at this stage of the proceeding. After the evidence is concluded I will have some further instructions to give you. The matter you are called upon to determine is not without difficulty because of the special nature of the issues to be submitted to you, but the court will endeavor, with, I am sure, the co-operation of the able counsel on both sides, to keep the evidence within the range that will enable you to fairly and impartially determine the precise issue that is to go before you.

The plaintiffs will present its evidence first. Did you [5] have in mind making some opening statement as to what evidence you wish to present, Mr. Carr?

Mr. Carr: I was going to ask leave to read the complaint in lieu of an opening statement.

The Court: No, I think the evidence in this case should be confined to the precise issue which is submitted to the jury. I think the court has suffi-

ciently explained the nature of the proceeding to the jury, and it would be unduly consuming time to do that. I do not wish to tell you how to present your case, but if you wish to outline to the jury the nature of the evidence you are going to present, I think that will be helpful. However, you may just go ahead and present your evidence, whichever procedure you wish to follow.

Mr. Carr: I would like to reserve our right to the reading of the complaint, because our position is, as your Honor probably knows, all the allegations of the complaint, except three, and answers to three of the paragraphs of the complaint, are admitted for purposes of this action and this action alone, this trial, by the defendants. There has been no answer to any of the allegations of the complaint except as to those three paragraphs. True, they have pled the statute of limitations, which in itself is an admission, as your Honor well knows, of all the allegations of the complaint, except those specifically denied. Now, while your Honor did provide in order that they might file a special answer and another answer [6] as the facts may be at the conclusion of this trial, and if such is necessary, nevertheless they did not deny for purposes of this action any of the allegations of the complaint except paragraphs 75, 81-A and 81-B. They did plead the statute. Now, I am prepared to argue that question and submit the authorities to your Honor, but I do not wish to become burdensome or anything, and if your Honor's mind is already made——

The Court: I think your point might be good on a determination of a question of law, but the jury is not called upon to determine any question of law. The point you make would be good if the court were determining, itself, some matter of law in which the allegations of the complaint were assumed to be true, but the jury is not going to determine a question of law here. It is only going to determine a question of fact. So, therefore, the only thing with which we are concerned, so far as the jury is concerned, is the question of fact that is to be submitted to them. I am not going to instruct the jury whether the allegations of the complaint are true or that they are untrue. That is a matter that will be met, if the time arises, upon a trial of the case. This jury is only to hear a specific, precise issue of fact, and this court will make a ruling of law thereafter, after the jury have found the question of fact. So I see no occasion for reading the complaint to the jury or advising the jury that any of the allegations are either true or not true for purposes of this [7] hearing.

Mr. Carr: Your Honor, in your Honor's order you referred to violations of the Antitrust Laws, and I think that would really make it necessary. How would the jury ascertain what those alleged violations of the Act consisted of, whether we had knowledge of those violations, or whether we discovered them, and I think by your Honor's very order you made it necessary that we at least read the complaint and present those facts to the jury. However, as I say, I do not wish to become burden-

some to your Honor or to the jury on this question. If your Honor has already made up your mind, we will simply make our offer and take our exceptions.

May I at this point, before it leaves my mind, except to your Honor's statement to the jury, so far as it refers to the order which your Honor made, and also except at this time to the provisions of that order? As I read the new rules, we have to make all special exceptions to the instructions to the jury, or to any statements of law, and for that reason I am not resting on the general provision as to exceptions, and I think as a matter of precaution we would like to have an exception to that portion of your Honor's statement in which you read to the jury your Honor's order made at the time of the preliminary hearing, the pre-trial hearing.

The Court: I do not quite follow you on that, Mr. Carr. What you wish to take exception to is the order heretofore made? [8]

Mr. Carr: Yes, your Honor, and your Honor's statement to the jury as to the terms of that particular order. We believe it is inadequate, with all due respect, and we would not like it to be stated to the jury without our having an exception to that particular statement.

The Court: Well, the record will show what you mean by an exception.

Mr. Carr: May we have such an exception?

The Court: Yes, exception.

Mr. Carr: As to the other, if your Honor please, at this time we ask permission to read to the jury

both the complaint and the answers of the separate defendants, and base that upon the statements which I have previously made, and also upon the ground that we contend that the defendants have admitted all the allegations of this complaint, except paragraphs 81, 82 and 83. Of course, the plea of statute of limitations admits all of the allegations of the complaint, and in the absence of a specific denial we believe that we are entitled to read on this hearing the complaint and all of its terms, and also further, by reason of the provisions of your Honor's pre-trial order——

Mr. Harrison: We object to that.

The Court: Counsel, if you wish to state the substance of the complaint, I suppose there cannot be any objection to that. I do not see any point in reading this long complaint [9] to the jury. I thought I had stated in substance the nature of the case. Would it add anything to it if you read the long complaint to the jury?

Mr. Carr: Yes, it would show to the jury the violations which we contend, the activities of these defendants, the formation of the 1929 conspiracy to violate the law, the fact that it was not discovered by the plaintiff, such conspiracy, which is the basis of a cause of action such as we have for treble damages, and that we did not discover that until the Government filed its suit here in the fall of 1944, the indictment and the civil suit against these defendants, or certain of them.

Mr. Harrison: We would object, if your Honor please, to any statement leading the jury to believe

that in any way we have admitted any of the allegations of the complaint, because our understanding is clear that upon this trial no such issue was presented, and we would object as misconduct to any statement indicating to the jury that there was any admission of these charges.

The Court: I think that is right, Mr. Carr. That is why I made the opening statement that I did to the jury. This case is not at issue, and I am not going to tell this jury that the defendant has admitted the allegations of the complaint. I haven't any right to say that to the jury. That is a matter for their own decision, and at the present time there has [10] been either no denial or no admission of the statement in the complaint, and I am not going to tell the jury that such is the fact when it is not, for purposes of law or any purpose, because that is not the question, and if the jury were to found its decision of the issue that is to be presented to it on the basis that the defendants are guilty of the charges that are alleged against them, I would not accept the verdict, because I would not be giving the defendants their day in court on the merits of the case, and I think we all understood that before, Mr. Carr, and that is why I was particular to tell the jury that they are not to consider extraneous matters. They are not concerned with whether the defendants are guilty or not guilty of the allegations in the complaint, or whether they are true or whether they are not true. I thought we had thoroughly, at the pre-trial hearing, understood that. There was a request for a jury trial on the

special issue relating to the issue of fact upon which the court might rule as to the statute of limitations, and that is all that this jury is going to hear in this case, and we decided that once before.

Mr. Carr: You sustain an objection, then?

The Court: Yes, I do.

Mr. Carr: May we enter our exception?

The Court: Yes.

Mr. Harrison: If your Honor please, inasmuch as I anticipate that a good part of the defendants' case will be [11] shown on the cross-examination of the plaintiff's witness, I believe it would be helpful to the jury, and we should like to ask the privilege of making now a statement to the jury of the facts which we intend to show in support of our contention that this question should be answered in the affirmative.

I understand that counsel does not desire to make an opening state?

Mr. Carr: I did not say that. [11-a]

Mr. Harrison: At any rate, we ask the privilege of making an opening statement.

The Court: Do you wish to make an opening statement, Mr. Carr?

Mr. Carr: A very short one, yes.

The Court: You may do so.

Opening Statement on Behalf of Plaintiff

Mr. Carr: May it please your Honor, and ladies and gentlemen of the Jury, we contend in this matter and we allege in this matter that the defendants violated the antitrust laws and as such inflicted severe damage on us.

We will show we had a plant with an investment of over a million dollars at Searles Lake for the manufacture first of borax and after of sodium and potassium and other salt, and that these defendants conspired among themselves not only to ruin plaintiff and destroy his business, but to control absolutely and create a monopoly of borax and borax products.

We will show that just the week we started commencing business down there manufacturing borax and shipping it in small packages, and our product was known as "Cinderella", we will show the first week we commenced operations the defendants lowered the price of borax so that it made it impossible for us to go ahead and carry on and perform our work.

We will also contend that we did not know of this conspiracy [12] or this fraud or this endeavor to put us out of business until the Government filed its suit here in this court in September of 1944, charging, first, that these defendants——

Mr. Harrison: If your Honor please, we object to any charges made in some other suit against some other persons.

Mr. Carr: That is the basis of our contention. We never knew the facts until the Government filed its suit.

Mr. Harrison: We object to that statement and assign it as misconduct.

The Court: The last part of the statement is all right.

Mr. Harrison: That may be, yes, but any description of any allegations in another suit certainly is not——

Mr. Carr: The whole thing turns around when did we discover this conspiracy and fraud which gave us the cause of action.

The Court: That only calls for a date.

Mr. Carr: We have to describe how we discovered it.

The Court: You have already stated it when the Government filed its suit.

Mr. Carr: When the Government filed an indictment and when the Government filed the suit—

Mr. Harrison: Now, I again assign that also as misconduct, may it please the Court, and as an attempt to get before the jury matters that are not proper to this question.

Mr. Carr: It is all proper, Mr. Harrison, the whole story [13] is proper.

The Court: Please, gentlemen: Ladies and gentlemen of the Jury, the lawyers always get into these arguments and waste time.

Mr. Carr: They do.

The Court: Please proceed with your argument.

Mr. Carr: We will further show, ladies and gentlemen of the Jury, that it was not until September of 1944 that we actually learned of these violations by the defendants of the Antitrust Laws on which our cause of action is based; and we will also prove that during all of that interval from the destruction, from the ceasing by the plaintiff of its business until September, 1944, Mr. Burnham and

the plaintiff endeavored to ascertain whether these violations had existed sufficient to enable them to bring an action against these defendants, but it was not until 1944 in September thereof, at the time I have stated, that we actually learned what the facts were and we really had a cause of action.

The evidence will show we knew what was happening to us and we knew we were being kicked around and lots of things were occurring that were unexplainable to us, but we never knew nor ascertained we had a cause of action until the situation was presented in 1944.

We will also show that these defendants, or the larger ones, the Borax Consolidated Company, the Pacific Coast Borax [14] Company, United States Borax—and the head office, the really controlling power, was in London—and we will show the United States Government itself did not know of these violations and did not discover them until shortly prior to the filing of the proceedings to which Mr. Harrison has referred in this court in September of 1944. Therefore, the statute did not begin to run against us until we discovered the actual conduct and the formation of this conspiracy to monopolize and to control prices, all in violation of the Anti-trust Laws.

The Court: Mr. Harrison?

Opening Statement on Behalf of Defendants Borax Consolidated, Ltd., Pacific Coast Borax Company, and United States Borax Company.

Mr. Harrison: May it please your Honor, and

ladies and gentlemen of the Jury, as His Honor has told you, the question which is submitted to you is this:

“At any time from May 17, 1929, to October 10, 1939, did Plaintiff know or have cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States?”

The defendants will offer testimony for the purpose of showing that the answer to this question should be “Yes”, that [15] during this period of time the plaintiff did believe and did have cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws.

Now, the question relates to what the plaintiff knew, or had cause to believe during the period which began almost twenty years ago in 1929. Many of the people who participated in those transactions are dead. In showing what the plaintiff knew, or had cause to believe, we shall rely upon evidence of what the plaintiff did, and also upon letters and documents which the plaintiff, or its President, George B. Burnham, wrote and signed. The documents which he signed and to which he swore are rather long and the burden of listening to them may be somewhat tiresome, but I hope by a brief statement now of some of the surrounding facts which we expect to prove and by a reference to some of the more important documents, to be of some help to you in understanding the evidence.

The defendants in this case fall into two groups. On the one hand there is the American Potash & Chemical Corporation, represented by Mr. Aitken and Mr. Beardsley. That company we call "American Potash".

On the other hand there is the group of companies we represent, the most important of which is the Pacific Coast Borax Company, and the others of which are United States Borax Company and Borax Consolidated, Ltd. The operating company [16] of this last group was the Pacific Coast Borax Company. At all times with which we are concerned, American Potash and Pacific Coast Borax Company were the largest producers of borax in the United States. There was this fundamental difference between them: Pacific Coast Borax produced its borax from mines, first in Death Valley, and after 1926, from the mines in the so-called Kramer District in San Bernardino County in this state; whereas American Potash extracted borax as well as potash, from the brines in Searles Lake, a large dry lake located in Inyo County, in this State.

The plaintiff, Burnham Chemical Company, was incorporated in the year 1921. It secured a lease from the Government on a part of Searles Lake——

Mr. Carr: May I interrupt? Counsel is referring now to activities in 1921. Your Honor has restricted the hearing and the evidence to the period between May 17, 1929 and October 10, 1939, and we object to Counsel going beyond the provisions of your Honor's ruling and order.

Mr. Harrison: I am stating only background facts, what we had before your Honor on questions arising on the deposition, the question whether we could show as we shall with your Honor's permission, what the plaintiff knew before 1929 as well as what he knew during this time for the purpose of showing what was in his mind in the material period.

Mr. Carr: We renew our objection. Of course, if we are [17] going to open the whole field, we ought to let the plaintiff tell the whole story.

The Court: I don't see anything objectionable in this preliminary statement of the facts.

Mr. Harrison: The plaintiff, Burnham Chemical Company, was incorporated in the year 1921, as I have said. It secured a lease from the Government on a part of Searles Lake and planned to extract borax from the brine of the lake by a process of solar exaporation. At all times from the date of its organization until the present time, George B. Burnham was its principal stockholder and its president and executive manager.

We shall show that on June 20, 1925, the Postmaster-General of the United States issued an order——

Mr. Carr: Now, we renew our objection to any reference to any activities prior to the time set by your Honor in the pre-trial order.

Mr. Harrison: Your Honor——

Mr. Carr: If there be impeachment, and that is one thing, all right, but the direct proof is another thing, and they have no right at this time to make

any statement as to any facts which they intend to prove unless it antedates May 17, 1929. That is in accordance with your Honor's question.

The Court: Wasn't that one of the questions I had to consider on the motions in connection with the deposition?

Mr. Harrison: Yes, your Honor. [18]

Mr. Carr: That was a different question entirely then.

The Court: Well, let me put it this way: Should not a litigant be given the opportunity to prove that between 1940 and 1944, for example, he had knowledge of the fact because of the fact that before 1940 he had knowledge of it?

Mr. Carr: Not under your Honor's order. That might be used for impeachment, but that does not constitute a proper statement at this time of what they are going to prove. Suppose no reference was made to the mail fraud order case: they would have no right to bring it in under your Honor's order. It would be only in the case of impeachment if you are intending to impeach the witness.

Mr. Harrison: We are not offering it for purposes of impeachment.

The Court: I don't quite follow that argument.

Mr. Carr: Why, if a man testifies he has no knowledge on a certain date, say, May 17, of violations and then they would have a right to impeach him by prior testimony as to prior activities, they would have no right——

The Court: But all the defendant is doing is telling what evidence he is going to present to dis-

pute the plaintiff's evidence. I don't know what impeachment has to do with that.

Mr. Carr: He cannot present any evidence as to the mail fraud order unless it was impeachment.

The Court: I think the defendant has a perfect right to do the same thing that you are going to be permitted to do. You are going to be permitted to present evidence that you did not have any knowledge. Now, the defendant comes along and says, "I want to present evidence he did have knowledge".

Mr. Carr: That is purely impeachment.

The Court: Why should the Court in the interests of justice permit one side to show one side of the evidence and prohibit the other side from showing the contrary?

Mr. Carr: That is anticipating impeachment. That is the objection.

The Court: I will overrule the objection.

Mr. Carr: Very well—exception.

Mr. Harrison: We shall show that on June 20, 1925, the Postmaster-General of the United States issued an order reciting that the plaintiff, Burnham Chemical Company, and George B. Burnham, its President, were engaged in conducting a scheme or device for obtaining money through the mails by means of false and fraudulent pretences and promises in violation of the laws of the United States, and directing that all letters addressed to him should be returned to the senders with the word "Fraudulent" stamped on the outside of such letters. This order was directed to the Postmaster at Reno, Ne-

vada, where the principal office of the plaintiff was located. This fraud order interrupted the plaintiff's campaign [20] to raise money by stock subscription and its plans to develop its business. The plaintiff, Burnham Chemical Company, thereupon filed a suit against the Postmaster at Reno, in the District Court for the District of Nevada, for the purpose of enjoining the enforcement of the fraud order, employing as his lawyers for that purpose, Mr. Francis J. Heney and Mr. B. D. Townsend, who were well known by reason of their experience in prosecuting under the Antitrust Laws.

On April 14, 1926, the plaintiff filed his amended complaint in this suit against the Postmaster. This complaint was sworn to by Burnham, as the President of the Burnham Chemical Company. We shall offer the complaint in evidence for the purpose of showing just what the plaintiff knew and believed on April 14, 1926, when the amended complaint was filed. The amended complaint is a long one, but the passages which bear upon the plaintiff's knowledge and belief are clear and unmistakable. They show in April, 1926, Burnham and his company charged and believed that the present defendants, American Potash and Pacific Coast Borax, had conspired to obtain the issuance of the fraud order for the purpose of driving the Burnham Company out of business; that they constituted a monopoly and conspiracy in restraint of trade, all in violation of the Antitrust Laws of the United States. In this amended complaint, the plaintiff called on the United States Government to prosecute these defendants under the [21] Antitrust Laws.

This was in April, 1926. In October of the same year, one of Burnham's associates and a director of the Burnham Company, Mr. C. W. Whitney, received a letter from Stephen T. Mather, who was at that time Director of the United States National Park Service. This letter was dated October 8, 1926, and stated that Mr. Mather was largely responsible for having the fraud order issued against Burnham in connection with what Mr. Mather called Burnham's "indiscriminate efforts to sell stock to men, women and children all over the world". This letter was dated October 8, 1926. It came to Burnham's attention a few weeks later. Burnham alleges in this suit that Mr. Mather had previously been the Chicago manager and representative of the Pacific Coast Borax Company. He also knew that Mather was the president of the Sterling Borax Company, which had connections with the Pacific Coast Borax Company.

Upon receiving this letter he was confirmed in his belief, already expressed in his amended complaint, that the fraud order had been brought about by these defendants, and from the time he learned of the letter right down until after '39 he attached the utmost importance to the letter as showing who was responsible for the injury his company had suffered. He had the letter photostated; he placed it in a safe-deposit box where he preserved it for years; he took it out of the [22] safe-deposit box and brought it with him on the many occasions between 1929 and 1939 when he went east to present his grievances against these defendants. The Burn-

ham Company attached so much importance to the Mather letter as showing the cause of the Post Office fraud order that in the following year, 1927, Whitney called on Mather in San Francisco for the purpose of ascertaining whether Mather was acting on behalf of the defendants. He was not satisfied with Mather's reply, and neither was Burnham. In the meantime, the injunction suit in Nevada dragged on, the delay being partly due to the Burnham Company's lack of funds.

In June, 1928, after years of stock selling and experimentation, the plaintiff, Burnham Chemical Company, began to produce borax at Searles Lake. In this very month when Burnham started production, a most remarkable development occurred. Borax had been selling at a price of \$75 per ton, and in the whole history of the industry, its price had never been much below that figure. In the very month that Burnham started production, these defendants, American Potash and Pacific Coast Borax, both simultaneously cut this price by one-third. In succeeding months they further reduced the price so that at the end of 1928 it had reached an unprecedented low. The effect upon the Burnham business was immediate and disastrous. The low price was below its cost of production; it could no longer sell borax at a profit; and as the result [23] of the price cut, it was compelled to, and did, shut down its plant permanently in January, 1929. Plaintiff, of course, knew of the price cuts; it knew that the cuts had been made by American Potash and Pacific Coast Borax simultaneously; it knew

that the initial cuts had been made in the very month when it started production; and it knew that the price cuts destroyed its borax business.

Immediately upon the occurrence of the price cuts in June, 1928, Burnham consulted his attorney, Townsend, and in the following month, on July 26, 1928, Mr. Townsend wrote a letter to a lawyer friend, Mr. Stanley Hinrich, in Washington, indicating his belief that the price cuts constituted a violation of the Antitrust Laws and stating that he was inclined to think that the competition was designed by the controlling heads of the two concerns, which are located in England, for the express purpose of killing off threatened competition, although their subordinates might not know that to be the fact. Townsend gave Burnham a copy of this letter.

Later in the same year, and on November 13, 1928, Townsend wrote Burnham an opinion letter expressing his belief that the price cuts were collusive and intended to destroy the Burnham Company, and that the excuses given for the price cuts were merely cloaks and disguises. He advised Burnham to take the matter up with the Federal Trade Commission.

In the following month, December, 1928, Burnham called on [240] Emlaw, one of the officers of American Potash, and accused American Potash of infringing the Burnham patents for the extraction of borax from lake brine. When Burnham made this accusation, Emlaw was angry and defiant and denied the charge. But Burnham did not believe him and made preparations to sue American Potash

for infringement of the patent. When Emlaw denied the charge, Burnham called on C. B. Zabriskie, one of the officers of Pacific Coast Borax, and asked that Pacific Coast Borax finance the proposed suit of Burnham against American Potash for patent infringement, in order that borax prices might be increased. After some discussion Zabriskie stated that he was impressed with the suggestion, but a little later he refused the proposal and this refusal increased the suspicions of Burnham.

In the spring of 1929 Burnham and Townsend went to Washington and New York. Before returning west, Burnham called on Zabriskie and Emlaw in New York on May 17, 1929. This date, May 17, 1929, is the commencement date in the question which is submitted to you by the Court.

Mr. Carr has told you what the testimony of his client will be as to what passed between Burnham and Zabriskie in the conversation of May 17, 1929. Zabriskie died a few years after this conversation took place, so that it is impossible to obtain his testimony about the conversation.

We shall show, however, with respect to that conversation, [25] on the basis of notes which Mr. Burnham himself made that the first thing which Burnham noticed when he entered Zabriskie's room was a picture of Stephen T. Mather on the wall of Zabriskie's office; that this immediately revived the suspicions which had been aroused when he learned of the Mather letter, and that he discussed with Zabriskie the connection between Pacific Coast Borax and Sterling Borax, of which Mather was

president. He did not, however, say a word about the Post Office fraud order, as to which he had charged, in his sworn amended complaint, three years before, that the order was brought about by the action of these defendants, including Zabriskie's own company, in violation of the Antitrust Law.

We expect that Burnham will testify that at this interview he accused Zabriskie of cutting the prices with American Potash to injure plaintiff, but that Zabriskie denied the accusation and told him that there was no connection between the price cut of Pacific Coast Borax and the price cut of American Potash. But we expect to show that so little did Burnham believe any such statement that on leaving Zabriskie's office, after stopping only for lunch, Burnham went straight away to Emlaw and accused him of conniving with Pacific Coast Borax in bringing about the price cut in order to damage the Burnham Company.

After these interviews, Burnham started west, but on May 29, 1929, he met Whitney in Chicago for the purpose of [26] interviewing Mather to find further facts in support of the charge that Mather had brought about the Post Office fraud order in order to injure the plaintiff and benefit the defendants.

In the following month, June of 1929, at a hearing before the Land Office in Los Angeles, Burnham, under oath, accused the American Potash of using his process to produce borax cheaply and drive the Burnham Company out of business.

By the fall of 1929, all of the Burnham borax was sold; it had permanently ceased production in Janu-

ary of that year. As soon as the Burnham borax had been sold, the defendants suddenly and simultaneously increased the price 30 per cent.

In the latter part of 1929 Burnham was endeavoring to press on for hearing his application for an injunction against the Postmaster at Reno. This application finally came on for hearing before the United States District Court at Carson City in January, 1930. On January 14, 1930, the plaintiff filed an affidavit in support of his motion for a temporary injunction. We shall offer this affidavit in evidence, because it shows Burnham's knowledge seven months after May of 1929 of the activities of the defendants and his conclusion that they were violating the Antitrust Laws. In this affidavit he reaffirmed under oath the truth of all his charges made in his amended complaint of 1926, and he set forth the price cuts of 1928, and the injury done to the plaintiff as the result of [27] those price cuts.

This affidavit was used upon the hearing before the Court, and as a result of that hearing, the Court temporarily enjoined the Postmaster from enforcing the fraud order so that the situation might be preserved until a final trial of the case.

In the years which followed 1930, Mr. Burnham was confirmed from time to time in his belief that these defendants had violated the Antitrust Laws. About the time when his borax business at Searles Lake was being destroyed by the drop in price, the Burnham Company had applied for a prospecting permit on the Little Placer borax property situated in the Kramer district. The Burnham Company

and the United States Borax Company, which was affiliated with Pacific Borax, were contesting the right to mine on Little Placer. On May 19, 1933, Burnham's application for a lease on the Little Placer was denied by the Land Office, which held that the mineral location of the United States Company was superior. We shall prove, by an affidavit sworn to by Mr. Burnham, that on this occasion his suspicions were again aroused and that he then believed that defendants, or some of them, were probably violating the Antitrust Laws.

His belief that the defendants were violating the Antitrust Laws was revived and confirmed in 1934. In that year he learned that Pacific Coast Borax had acquired the properties [28] of Western Borax Company in the Kramer district, and had secured a lease from the only active producer of borax in that district, the Suckow Mining Company. He realized that the Pacific Coast Borax Company was about to secure a patent on the Little Placer claim, and that if they did, they would have a one hundred per cent monopoly on the Kramer borax field, which he claimed would be in violation of the Antitrust Laws. He had heard that Mr. Neblett, the partner of Senator McAdoo, acting as counsel for a Senate Investigating Committee, had made a charge of monopolization in violation of the Antitrust Law against the Pacific Coast Borax Company. In this situation he had a conference with his attorney, Mr. Townsend, on July 30, 1934. Townsend suggested that he go east and get in touch with public officials in connection with the monopoly. He advised him

to take with him all documents that might be useful, including the amended complaint, the affidavit of January, 1930, and the Mather letter. All this aroused Burnham's suspicions and belief that the defendants were violating the Antitrust Laws.

Immediately after this discussion with Townsend, Burnham started east, carrying with him these documents and also a letter of introduction from Heney to Mr. Louis Glavis, who was head of the Bureau of Investigation of the Department of the Interior. The letter said that Burnham intended to talk to Glavis about the matter of the Pacific Coast Borax Company [29] having established an evil and strangling monopoly in the borax business, which was, of course, a violation of the Antitrust Laws. Burnham interviewed Glavis; told him of his grievances; told him that the very month his company started production their two competitors had cut the price; told him that after his borax was sold, the competitors again raised the price. These facts he told him because he believed these facts to be significant as bearing on the violation of the Antitrust Laws by the defendants.

Later in the same month, on September 21, 1934, Burnham addressed a letter to the Secretary of the Interior, in which he again made complaint of the damage done as the result of the price cut in 1926 and protested against the growing monopoly in the borax business.

Two years later, in 1936, the Senate adopted a resolution for an investigation of the potash industry, and Senator Pittman, a member of the In-

investigating Committee, wrote the Burnham Chemical Company, asking for information. Burnham replied on October 10, 1936, describing the defendants as the British Borax Trust, telling of the damage done by the Post Office fraud order, which he said was probably influenced by his competitors, that is to say, American Potash and Pacific Coast Borax. He again called attention to the damage done by the cut in the borax price in the very month the Burnham production was started. [30]

I have said that in 1930 the District Court of Nevada granted a temporary injunction against the enforcement of the Post Office fraud order. The suit, however, was not prosecuted by the Burnham Company, and was dismissed for lack of prosecution in 1935. In September, 1937, the Post Office began again to enforce the order and stopped the mail coming to the Burnham Company. This aroused the suspicions of Burnham and his belief that the defendants, American Potash and Pacific Coast Borax, whom he described as the Borax Trust, were responsible for the injury.

In May, 1938, he consulted a new attorney, Mr. William Stephens, of New York, and unburdened his troubles to him, including the price cuts of 1928. We shall show that when Burnham stated his case to Mr. Stephens, Mr. Stephens was impressed with the simultaneous cuts in price and said that that might indicate a violation of law, but he expressed a doubt whether he had a chance with the Federal Trade Commission, because the claim based on the price cuts had been outlawed.

In August, 1939, Burnham decided to go to Washington to attend a hearing involving the rights of the defendant, United States Borax Company, to a patent on the Little Placer. He left the west coast in early September and took with him the Mather letter of 1926, and a copy of the Hinrichs' letter of 1928, because he thought they were important documents of which he could make good use. He also intended to consult Mr. [31] Stephens in New York on this trip.

In November of 1939 he called on Mr. Wendell Berge of the Antitrust Division of the Department of Justice and described his claims that the defendants had violated the Antitrust Laws.

What he told Mr. Berge on that occasion was repeated in a letter which he wrote on November 22, 1939, to Mr. Thurman W. Arnold, Assistant Attorney-General in Charge of Antitrust Prosecutions. This letter is most important, because it states with clarity Burnham's belief that these defendants had violated the Antitrust Law and thereby damaged the plaintiff. The facts about the price cuts are restated. In this letter Burnham says that "the fact that the price cutting started the month we began production convinces us that it was aimed purposely to destroy us". Burnham then goes on to say that in 1928 he consulted Heney and Townsend, who advised him that he had a case under the Antitrust Laws. The 1928 letter from Townsend to Hinrichs in July, 1928, was enclosed with the letter; and in the letter itself, Burnham says that the only reason he had not prosecuted was

because of lack of funds. All the facts stated in this letter had been known to Burnham for ten years before. The same complaints were made in a letter addressed to the Secretary of the Interior on November 18, 1939.

On the basis of all these facts, including the repeated [32] statements of Burnham, made in the letters which he signed and documents to which he solemnly swore, we shall ask you to reply to the question of the Court that the plaintiff did, between May 17, 1929, and October 10, 1939, have good cause to believe that its business had been theretofore damaged by acts of the defendants in violation of the Antitrust Laws of the United States.

The Court: The reporter needs a little rest. He has been taking down a lot of long statements for some time.

Ladies and gentlemen of the Jury, at this time we will take a short recess. I will ask you to bear in mind that at all times when you are absent from the courtroom it is your duty not to talk about this case among yourselves, nor let anybody else talk to you about it or any subject connected with it; nor are you to form or express any opinion on the case until it is finally submitted to you.

(Recess.) [33]

Mr. Carr: May I at this time offer a proposed instruction?

The Court: Very well. Did you want to make a statement, Mr. Aitken?

Mr. Aitken: If it please the Court, ladies and gentlemen of the jury, Mr. Beardsley and I represent the defendant American Potash & Chemical Company, the other defendant, as distinguished from the group represented by Mr. Harrison. In a matter of this kind, where it is very apparent that the case will be somewhat lengthy and take a great deal of the jurors' time, we attorneys on the defendants' side of the table, where we are representing individual and separate defendants, feel it is desirable and helpful not only to the court, but to the jurors, to as much as possible avoid repetition, and for that reason we have agreed and will continue to, as far as possible, permit Mr. Harrison to make the opening statement and conduct the examination of the witnesses. If there are matters that occur from time to time that we as counsel for the defendant American Potash feel necessary to say something about, we will do so, but for the most part, while we are independent parties, yet we are charged jointly in this matter and feel, therefore, it would be much to your advantage and to the court's advantage to make the matter conducted by one counsel. I give that explanation and point out to you why we will not take a more active part individually in the defense of our client. [34]

In connection with the facts which Mr. Harrison so clearly recited to you in his opening statement, I do not want to have the jury get the impression that so far as my client is concerned, we thereby are admitting that those facts constitute a violation of the Antitrust Laws, though we do feel, and we want

to leave with his jury the thought unquestionably they are fact, and being as they were well known to the plaintiff in this case, gave him good cause to believe that there had been a violation of the Antitrust Laws to the injury of the plaintiff corporation, and that is the issue before you, and that is the purpose for calling these facts to your attention, to show that there was the existence of facts which gave the plaintiff good cause to believe, during the period that is defined in the order, that he had been injured by the acts of the defendants in violation of the Antitrust Laws.

Mr. Carr: May I make one very brief reply, if it please your Honor? Mr. Harrison stated to you what they did do, and he recited very fully what happened us, and they knowingly did to us, but we will show that at the time they were doing these things to us they were lulling Mr. Burnham into the belief that they were not doing them through any violation of the Antitrust Laws. The evidence will show that he talked with the officers. He asked them about the various acts, and the officers advised him that it was purely incidental, that the things they were doing were not intended to [35] destroy or injure Mr. Burnham's company in any respect. In other words, they lulled him into a sense of security and belief that there was no violation of the Antitrust Act.

As these things occur from time to time, the evidence will show that Mr. Burnham presented them to various officers of the Government in Washington and in San Francisco, asking their advice as

to whether or not these things did constitute violations of the Antitrust Act, and in all of those instances he was advised that they were not, and that he had no cause of action against these defendants under the Antitrust Act. The evidence will show no doubt Mr. Burnham knew all that was happening to him as stated by Mr. Harrison, but he did not know, until the Government filed its actions here in the fall of 1944, that all of these acts done and performed as stated by Mr. Harrison by these defendants were done pursuant to an unlawful agreement and combination and conspiracy to control the prices and monopolize the industry, and we will show that it was not until that came to Mr. Burnham's attention that we were in a position to have commenced this action.

We will also show up to that time the Government, or shortly prior thereto the Government did not know that these people had actually violated the Antitrust Law, and we will also show it was not until after this last war that the Government went into the books, got into the books of the American Potash & Chemical Company and found that that was a German-owned [36] corporation instead of a British-owned corporation, as it had been previously thought to be, that the Government, itself, with all of its powers, were able to ascertain the true facts of this conspiracy which we allege in our complaint.

Mr. Burnham, will you be good enough to take the stand, please? Were you going to say something?

Mr. Harrison: Well——

The Court: He was going to object to something you said but he changed his mind.

Mr. Carr: I will stipulate you may have all the objections you want.

Mr. Harrison: To save time we will go ahead with the evidence.

Mr. Carr: I will call Mr. Burnham. Mr. Burnham, you had better take with you your various records and documents that you have.

The Witness: Shall I bring the other suitcase, too?

Mr. Carr: Oh, no. We won't get that far before noon.

GEORGE B. BURNHAM

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Q. State your name to the court and jury. A. George B. Burnham.

Direct Examination

By Mr. Carr:

Q. Where do you reside, Mr. Burnham? [37]

A. In Oakland, California.

Q. What is your business?

A. President and director of the Burnham Chemical Company.

Q. The plaintiff herein?

A. The plaintiff, yes.

Q. How long have you been such?

A. Since 1921. There were one or two years when I was not *present*, but practically all the time since 1921.

(Testimony of George B. Burnham.)

Q. The Burnham Chemical Company was incorporated when? A. In 1921.

Q. Under the laws of the State of Nevada is that correct? A. That is right.

Q. What was the business of the Burnham Chemical Company?

A. The business of producing borax and other chemicals from the saline brine of Searles Lake, in San Bernardino County, California.

Q. Mr. Burnham, you are an American citizen?

A. Yes.

Q. Where were you educated?

A. University of California.

Q. Did you hold any position there upon your graduation?

A. For a while I was assistant instructor in the Department of Physics.

Q. You left the University to take up this borax operation, is that correct? [38] A. Yes.

Q. You had, I believe, prior to your resignation from the university, done certain work along this borax line, had you?

A. Yes, I did a great deal of research work in developing processes for recovering potash, borax, and other chemicals from the alkaline lakes of the California and Nevada deserts.

Q. And it was in this connection that you organized the Burnham Chemical Company; in fact, you went to work in the Searles Lake field prior to the incorporation of the company, did you not?

A. Yes, I did. I went to work at Searles Lake in 1918.

(Testimony of George B. Burnham.)

Q. How many stockholders are there of the Burnham Chemical Company?

A. There are about 7000 stockholders in the Burnham Chemical Company.

Q. Mr. Burnham, did you know on May 17, 1929 or at any time between May 17, 1929 and October 10, 1939, inclusive, that the business of the Burnham Chemical Company, the plaintiff herein, had been damaged by the acts of the defendants, or some of them, in violation of the Antitrust Laws?

A. No.

Mr. Harrison: I object to that on the ground it calls for the conclusion of the witness, if the Court please, is leading, and is the precise issue to be passed upon by the jury.

Mr. Carr: It is asking him about a fact, whether he knew.

The Court: I will overrule the objection. You can cross-examine [39] him on that.

Q. (By Mr. Carr): What is your answer, Mr. Burnham? A. The answer is "No."

Q. Did you do anything from May 17, 1929 to October 10, 1939, inclusive, to ascertain whether or not the defendants herein, or some of them, had violated the Antitrust Laws? A. Yes, I did.

Q. What did you do?

A. I did a great many things.

Q. Will you state, commencing with May 17, 1929, what investigations you made, if any, as to the activities of these defendants as alleged in the complaint? A. On May 17th—

(Testimony of George B. Burnham.)

Q. You have in your pocket, have you not, a memo of the various dates on which you did certain things, is that correct? A. Yes, I have.

Mr. Harrison: If the Court please, we object to a question of investigations. The question here is as to knowledge, what he knew or what he had cause to believe. The issue is not one of diligence; the issue is one of his knowledge.

Mr. Carr: It is diligence. We will show just what he did during all of this period of time. We have asked him and he has answered that he made certain investigations as to the activities of these defendants.

The Court: I shall overrule the objection. I think it is [40] a matter that you can cover by such examination as you wish to make of the witness. It is very difficult to rule in advance as to the materiality of a question of this kind. It depends upon what the man did do. I think it can be better reached latter on.

Mr. Carr: May it please your Honor, Mr. Burnham has a brief chronological order of his activities, and may he in testifying refer to that? It is just for the purpose of refreshing his memory.

Mr. Harrison: Was it made at the time of the event?

Mr. Carr: No.

Mr. Harrison: We object to it, if the Court please.

Mr. Carr: It is simply recalling to his mind. He cannot remember the specific dates. It just

(Testimony of George B. Burnham.)

recalls to his mind the dates when he did certain things. There was a long list of activities on his part as to what he did at this time. It is just merely for the purpose of refreshing his memory, notes he has made from his own records.

Mr. Harrison: We object to that unless the original records made at the time are produced, if the Court please. The witness cannot testify to something he has written up for the purpose of testifying.

Mr. Carr: This is not a memo. of his testimony. It is simply the dates and the headings.

The Court: I do not think, Mr. Carr, that that would be [41] proper. The witness has to testify on the witness stand of matters of his own knowledge. If he has some memo. made at the time for the purpose of refreshing his memory, you can use that, but, as counsel has said, the witness cannot write out his testimony in advance.

Mr. Carr: It is not writing out his testimony, your Honor; it is just a statement of dates put in chronological order.

Mr. Harrison: That is part of the testimony.

Mr. Carr: I can ask him the questions from the counsel table and arrive at the same thing.

The Court: That is all right, but I do not think it would be proper for a witness to have a document in front of him that he, himself, prepared at some other time.

Mr. Carr: It is not his testimony. It is just the dates. I will ask him then, your Honor, from

(Testimony of George B. Burnham.)

the counsel table. It is just to refresh his own memory on the witness stand.

Q. Mr. Burnham, on May 17, 1929, did you see Mr. C. B. Zabriskie, the vice-president and general manager of Pacific Coast Borax Company?

Mr. Harrison: That is objected to on the ground it is leading, if the Court please.

The Court: I will overrule the objection.

A. Yes, I did.

Q. (By Mr. Carr): Where did you see him?

A. In New York, at the office of his corporation, the Pacific Coast Borax Company. [42]

Q. Did you have a conversation with him at that time? A. Yes.

Q. Was anybody present besides yourselves?

A. No.

Q. You and Mr. Zabriskie?

A. Just Mr. Zabriskie and myself alone.

Q. Had you know Mr. Zabriskie previous to this time?

A. Yes, for many years.

Q. What was the conversation you had with Mr. Zabriskie at that time?

A. I told Mr. Zabriskie that it looked to me like his company and the American Potash & Chemical Corporation had cut the prices on borax deliberately to drive us out of business, and Mr. Zabriskie said no, they didn't do that. They weren't trying to injure us; that the price of borax had fallen due to the over-production of borax; furthermore, they had a cheaper process, a cheaper

(Testimony of George B. Burnham.)

source of borax in the Kramer Borax District, and that was another reason why the price of borax went down.

I asked him if Mr. Mather, of the Stirling Borax Company had any stock in the Pacific Borax Company, and he said no.

I said, "Well, I understand that Stirling Borax Company is a subsidiary of your company."

He said, "Yes."

And I said, "Well, don't they sell their borax at prices that you determine they should sell it for?"

He said, "No, the Stirling Borax sell their borax at any [43] price that they wish to."

I said, "Well, it seems to me this drastic cut in the price of borax just the month we start production is a matter that we should take up before the Federal Trade Commission to see if any anti-trust laws are being violated."

And he said, "It wouldn't do any good, because there is no violation of any law. The price of borax has gone down due to an over-production, and due to the fact that we have a better source of borax." And he went at great length to explain to me why the price had fallen. And after a long talk with Mr. Zabriskie I concluded that he was right. He was very convincing in his argument.

Mr. Harrison: I think that last statement was not responsive and did not relate to the conversation.

(Testimony of George B. Burnham.)

Mr. Carr: It is what he believed, your Honor.

The Court: He was asked to state the conversation, and the last statement of the witness commencing with the words "after a long talk" may go out.

Mr. Harrison: In order that the record may be preserved, if the Court please, we desire to object and move to strike out the answer of the witness on the ground that the plaintiff has no right to rely upon any denial of the charge made by the defendants or anyone in their behalf.

Mr. Carr: He is an officer.

The Court: I will overrule that objection. It goes to the [44] weight of the evidence.

Q. (By Mr. Carr): Did you believe what Mr. Zabriskie told you at that time?

A. Yes, I did.

Q. And you continued in such belief for how long?

A. Until September, 1944, when the Department of Justice brought its indictment against my competitors.

Mr. Harrison: I move to strike out any reference beyond the date, if the Court please.

Mr. Carr: Are you going to stick to that?

Mr. Harrison: Yes, indeed.

Mr. Carr: Remember, if you are going to stick to that you can't bring anything in about the fraud order.

Mr. Harrison: Oh, no.

Mr. Carr: If you are going to stick to that.

(Testimony of George B. Burnham.)

The Court: If you are going to get into these arguments, I am pretty easy about conducting the court, but I am going to insist that counsel address the court. Otherwise we waste too much time in side issues.

Mr. Carr: Yes, your Honor.

Mr. Harrison: I move to strike that out.

The Court: I will deny the motion.

(The last question and answer were read by the reporter.)

Q. (By Mr. Carr): Mr. Burnham, on May 17, 1929, did you or did you not call on Mr. H. S. Emlaw? [45]

A. Yes, I called on him also.

Q. That same day?

A. That same day. He was president of the American Potash & Chemical Corporation, our other competitor.

Q. Where was his office?

A. In New York City.

Q. Had you known Mr. Emlaw previous to that time? A. Only just briefly.

Q. Did you have a conversation with him at that time? A. Yes, I did.

Q. And this was all in his office? A. Yes.

Q. Was anyone else present besides yourself and Mr. Emlaw?

A. Somebody came in and went out, but I don't remember who it was.

Q. What was that conversation, Mr. Burnham?

(Testimony of George B. Burnham.)

A. I told Mr. Emlaw that I believe price-cutting was aimed at the Burnham Chemical Company, to destroy our business, and Mr. Emlaw said, "That is not so," that there is an over-production of borax—in fact, their warehouse was full of borax and they could not sell it, but they would be glad to sell it to anybody if they could just get an offer, and it was the over-production of borax that caused the price to go down so drastically.

He also explained to me, and of course I already knew, [46] that for every three or four tons of borax that they made they also made about two tons—excuse me—for every three of four tons that they made they also made two tons of borax. There was quite a demand for potash, and therefore they were making lots of potash, with the result that a great deal of borax was also being made and accumulating in their warehouse.

Q. Mr. Burnham, did you make any record of these conversations? A. Yes.

Q. What in? A. In my notebook.

Q. Your personal notebook? A. Yes.

Q. When did you make these records?

A. Shortly after the conversation with Mr. Zabriskie and with Mr. Emlaw.

Q. Have you that notebook with you?

A. Yes, I have.

Q. Will you please open it to the place and read to the jury what you have therein?

A. I write these notes in the evening after my day's work is done, or sometimes I write them on trains or on subways.

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): The question is to read, please, Mr. Burnham.

The Witness: Excuse me. I have here a memorandum dated May 17, 1929: "Had a discussion with C. Zabriskie. Says [47] Steve Mather not a stockholder in P.C.B. They are competitors. Have picture of Mather on wall. They sell borax at any price they wish. P.C.B. sells crude borax to them. Doesn't believe Federal Trade Commission could do anything. Trona have to sell. It can't help it."

Q. (By Mr. Carr): Trona was the American Potash?

A. That is right. The American Potash & Chemical Corporation's plant is located at Trona, California.

Another memorandum says: "Zabriskie believes du Pont did not buy interest. London Times Financial Section, Amalgamated Mines Trust, South Africa, May 3rd, which is a subsidiary in question."

That is practically all of the memorandum.

Q. What is that?

A. That is the substance of the memorandum of my visit with Mr. Zabriskie.

Q. Not the substance; is it the memorandum, the full memorandum? A. The notes, yes.

Q. Did you have a similar memorandum of your conversation with Mr. Emlaw? A. Yes.

Q. Is that entered in your book?

A. It is also entered here in the book.

Q. Was the entry made about the same time?

A. It is also dated May 17, 1929. [48]

(Testimony of George B. Burnham.)

Q. Was that entry made shortly after your conversation with Mr. Emlaw? A. Yes.

Q. I should have asked you that question about Mr. Zabriskie. Was it made shortly after your conversation with Mr. Zabriskie?

A. Yes. I called on Mr. Zabriskie in the morning and Mr. Emlaw in the afternoon.

Q. Will you be good enough, Mr. Burnham, to read what your entry is with respect to Mr. Emlaw?

A. It states: "May 17, 1939. Called on Emlaw, of the American Potash & Chemical Corporation regarding the concentration—regarding the selling of concentrated brine. Says brine must have enough sodium carbonate to make—" and this formula I will read—

Mr. Harrison: "Must be enough"?

The Witness: I will read just as it says: "Says brine must have enough $\text{Na}_2 \text{CO}_3$ to make 3 $\text{Na}_2 \text{CO}_4$, 2 $\text{Na}_2 \text{CO}_3$. Refer matter to Burke. Didn't discuss patents. Emlaw says not selling. Nothing in it."

Q. (By Mr. Carr): Not what?

A. "Nothing in it."

Q. (By Mr. Harrison): Is that on the same page?

A. That is on two pages before, but it concerns that same conversation. I will repeat that. I have the same words here: "American Potash & Chemical Corporation, 233 Broadway, Whitehall, [49] 7240, P. C. B., Beekman 0332," and then I have an arrow going from the American Potash & Chem-

(Testimony of George B. Burnham.)

ical Corporation down to this sentence: "Emlaw says not selling. Nothing in it. Would sell if he could get an offer."

The Court: We will take the noon recess at this time, gentlemen. Ladies and gentlemen, we will recess at this time and reconvene at 2:00 o'clock. Please return at that time, and bear in mind the admonition that I gave you earlier this morning.

(A recess was taken until two o'clock p.m.)

Afternoon Session, March 27, 1947

2:00 P.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Shall we proceed, your Honor?

The Court: Yes.

GEORGE B. BURNHAM

recalled;

Direct Examination

(Resumed.)

By Mr. Carr:

Q. Mr. Burnham, just before conclusion of the court you testified that you believed Mr. Zabriskie's statement to you. When did you come to that conclusion? What period of time, I mean?

A. Well, after my talk with Mr. Zabriskie I was very much convinced that what he said was true, but as long as I was in New York I decided to go over——

(Testimony of George B. Burnham.)

The Court: The question was: When did you come to that conclusion?

A. Oh, right after my talk with Mr. Zabriskie, that is, I was very much convinced that what he said was true.

Q. (By Mr. Carr): Then when did you finally become definitely convinced in your own mind that his statements to you were true?

A. After my talk with Mr. Emlaw which confirmed Mr. Zabriskie's statement.

Q. Then am I right in saying when you wrote down those notes [51] in your book you had come to the firm belief that the statements of both of those gentlemen were true? A. Yes.

Mr. Harrison: I object to that as highly leading. The subject matter has been covered.

The Witness: Yes.

The Court: Read the question.

(Question read.)

The Court: I will allow it.

Q. (By Mr. Carr): Will you refer again to your conversation with Mr. Emlaw in your notebook, please?

Mr. Harrison: By the way, Mr. Carr, may that be marked by the clerk for identification?

Mr. Carr: Yes, but we would not like it to go out of our possession.

The Court: Mr. Harrison wants it identified so it may be identified in the record.

Mr. Carr: Let me ask a few questions about this book.

(Testimony of George B. Burnham.)

Q. Mr. Burnham, are those your personal records, or are they the records of the Burnham Chemical Company?

A. They are my personal records.

Q. How long have you kept such books, if you have kept them over a period of time?

A. Since 1923.

Q. What are they? What do they consist of, those little black [52] books, as we call them?

A. They are little memorandums that I want to jot down and remember. Originally they started out as merely notes, but as time went on there was a lot of diary information that was put into them.

Q. It is your own personal record, is that correct?

A. That is right, my own personal records.

Mr. Carr: We have no objection that they be marked.

The Court: Let the book be marked Plaintiff's 1 For Identification.

The Witness: It has been marked there already.

Mr. Carr: It has been marked for the deposition already.

The Court: Put a sticker on it.

Q. (By Mr. Harrison): What year?

A. 1929.

Q. That is a book which is marked on the outside "29"? A. "29," yes.

(The document in question was thereupon marked Plaintiff's Exhibit 1 For Identification.)

(Testimony of George B. Burnham.)

Q. (By Mr. Carr): If you refer, please, Mr. Burnham, to that note in reference to a conversation with Mr. Emlaw to which you testified this morning—

A. Shall I read it all over again?

Mr. Harrison: What is that?

The Court: He has not asked you a question.

Q. (By Mr. Carr): No, refer to that. Open it up. What did Mr. Emlaw say about not selling?

Mr. Harrison: What are you asking for now? The entry?

Mr. Carr: Yes, what the entry says.

The Witness: The words about not selling read this way: "Emlaw not selling."—"Emlaw says not selling. Nothing in it."

Q. (By Mr. Carr): What does that refer to?

Q. (By Mr. Harrison): Is that all the entry on that point?

A. No, there is another sentence: "Would sell if could get an offer."

Q. (By Mr. Carr): To what did that refer?

Mr. Harrison: If your Honor please, if counsel's question is directed to the conversation we have no objection, but we submit the witness should not be asked to interpret his memorandum.

Mr. Carr: The only way we can do it is from the witness.

Mr. Harrison: I object to the question unless it is clarified as directed to the conversation.

Mr. Carr: It is.

(Testimony of George B. Burnham.)

Q. Does that refer to the conversation you had with Mr. Emlaw, or any part of it?

A. Yes, it does.

Q. What does it refer to? What part of the conversation, and what is the conversation to which that memo. refers? [54]

A. It is concerning the sale of borax.

Q. What was the conversation on that point, Mr. Burnham?

A. Mr. Emlaw was explaining to me that their warehouse was full of borax and they could not sell any, and it wasn't selling, that there wasn't any money in it, anyway, but nevertheless he would sell the borax if he could get an offer.

Q. Mr. Burnham, on or about May 25, 1929, did you or did you not call on Mr. Seth Richardson, an Assistant Attorney General of the United States?

Mr. Harrison: Is the question directed to his knowledge?

Mr. Carr: Yes.

Q. Did you or did you not?

A. Yes, I did.

Q. Where did you call on him?

A. In Washington, D. C.

Q. Was he a Government official? A. Yes.

Q. What was his position?

A. Assistant Attorney General.

Q. You called at the Department of Justice to see him, did you? A. Yes.

Q. Did you have a conversation with him at that time? A. Yes, I did.

(Testimony of George B. Burnham.)

Q. Who was present at that conversation?

A. Mr. Ridley. [55]

Q. Who is Mr. Ridley?

A. He was somebody connected with the Department of Justice.

Q. What was that conversation that you had with Mr. Richardson?

Mr. Harrison: That is objected to, if the Court please, on the ground it is incompetent, irrelevant, and immaterial, and calls for hearsay testimony. In other words, if the witness is to be allowed to repeat every conversation he had with anybody during this whole period of ten years, we submit it will be wholly immaterial and might be highly prejudicial. The fact that somebody else said to him this, that, or the other thing certainly is not sufficient to prove that he did not know, negative form, and we submit the witness has been asked whether he knew, and he has stated, but that it is wholly incompetent to have him show what somebody told him. Certainly the defendants are not bound. The defendants are charged with having made certain statements here, and they cannot be bound by what some third person said.

Mr. Carr: The defendants are not charged with having made any statements here, your Honor. This examination is going to the good faith. The witness has already testified that he did endeavor to ascertain whether or not these people were violating the Anti-trust Laws. Then I asked him what did he do in that respect. Obviously, this is the only way in

(Testimony of George B. Burnham.)

which it can be reached, and this is a conversation with a Government official. [56]

The Court: I do not understand how you can avoid the hearsay rule.

Mr. Carr: It is not hearsay.

The Court: Suppose he went down and talked to the newsboy; how can that be admissible?

Mr. Carr: That would not be an officer of the Government who would be empowered to go after these fellows for Anti-trust violations. The question is whether or not he used reasonable efforts to ascertain whether or not these people were violating the Anti-trust Laws.

The Court: I do not see the materiality of that, Mr. Carr. The only question is whether the plaintiff knew or had good cause to believe that he had a cause of action.

Mr. Carr: Exactly. Under your Honor's ruling the test is good cause to believe, and what greater investigation could he make than to go to the people of the Government who were charged with the enforcement of the Anti-trust Law? It is all in substantiation of his statement that he did not know or did not believe that these people were violating the Anti-trust Laws until the Government action at or in 1944. Now, this goes to the very question of his belief. Without that, it shows what his activities were. I agree with your Honor that the burden is upon the plaintiff that he show reasonable diligence to discover whether or not these violations——

(Testimony of George B. Burnham.)

The Court: I do not think the plaintiff has any such burden [57] as that. He has already testified that he neither knew or believed he had any cause of action against the defendants until 1944. That is his own testimony. That is, shall we say, a *prima facie* showing.

Mr. Carr: But we have to also show under your Honor's ruling that we used reasonable diligence in the face of the fact that the statute apparently has run.

Mr. Harrison: I do not understand your Honor has ever so ruled or that any question of due diligence was ever imported into this case for the purpose of this specific issue. Now, this specific issue is, Did this man know at any time during the period of ten years or did he have cause to believe that certain things occurred, and testimony of his as to whether or not he knew certain things had happened would be admissible. If he knew, then the answer should be "Yes," and if he did not know, the answer should be "No," and that is true whether he used diligence or not. The question is his knowledge and his belief. Under the guise of attempting to prove a wholly immaterial issue about diligence, counsel is now seeking to import into the case evidence of conversations at which opinions may have been expressed by people, and it does not make in point of law a particle of difference whether the person who spoke, if he did speak, was a subordinate official of the Government, or an utter stranger. Under such a rule he could prove any

(Testimony of George B. Burnham.)

conversation tending to indicate one opinion, [58] just as any conversation would be omitted, I assume, which tended to indicate another. We submit it is utterly immaterial. It does not bear on the real issue before the jury. It is prejudicial and hearsay.

Mr. Carr: Have you finished?

Mr. Harrison: Yes.

Mr. Carr: The question and the law is, as your Honor well knows, in cases of this kind where the statute has run on the face of the situation, and where fraud is charged, as it is here, and the matter concealed, as it is charged here, we have to show that inasmuch as the statute has run, why, we did not discover this fraud or our cause of action within the three-year period, and to do that we have to show that we exercised due diligence in doing that.

The last case on the situation that we find is Hansen vs. The Bear Film Company, reported in——

Mr. Harrison: If your Honor please, may I suggest if the argument is going to be lengthy that we may pursue that without bothering the jury with it?

The Court: Let me hear what Mr. Carr has to say.

Mr. Carr: I said that the last decision is Hansen vs. The Bear Film Company, a decision of the Supreme Court decided on May 7th of last year, in which it was said, "Where a defendant is guilty of fraudulent concealment of a cause of action, the

(Testimony of George B. Burnham.)

statute of limitations is deemed not to become operative [59] until the aggrieved party discovers the existence of the cause of action.”

The Court: I understand the point that both of you have made, but I do not see what any affirmative acts on the part of the aggrieved party have to do with it. He does not have to do anything if he has not discovered it.

Mr. Carr: If we have any suspicions, if a party has any suspicions or thoughts on the subject, he cannot sit down and remain inactive in a situation of this kind.

The Court: But the witness has already testified, Mr. Carr, that he did not know he had a cause of action until 1944. What has diligence got to do with it? I do not know of any holding of any court to that effect. If he does not know it, he doesn't know it, and that is the end of that, and he has a right to bring his action at a later time.

Mr. Carr: He cannot sit by, your Honor, if he has any idea of the possibility of the situation. He can't sit by and do nothing. He must exert himself to ascertain whether or not his suspicion is worthy of fruit, whether it bears fruit or whether it is founded in fact. In the Pashley case, which your Honor has read, it goes into that very fully.

The Court: It may be by way of rebuttal, if the defense presents some evidence, it might then be proper. I do not know. I am just guessing at that. It might be proper for you to answer that by saying, “Yes, the defendant did know about [60]

(Testimony of George B. Burnham.)

that," or "The plaintiff did know about that, but he investigated it and he found that there was no reason for him to bother about that." But I do not see how you can prove a negative now as part of your affirmative case.

Mr. Carr: Maybe your Honor is correct.

The Court: I am not going to shut you out from presenting anything that is material to the case. This line of examination at this time is purely a negative matter. It is purely hearsay.

Mr. Carr: If that is correct, and we are not to be precluded on redirect or rebuttal, why, of course, I think your Honor is correct. I think, *prima facie*, we have probably proved our case.

The Court: I am not going to rule on that, but you have directed your inquiries to the precise question of knowledge and belief, and that is that. You may have to meet some new matters later on, but I do not see how you can meet them in advance until you know what they are.

Mr. Carr: As long as we are not precluded. We would be very glad to let the matter rest now with a few more questions.

The Court: I will sustain the objection.

Mr. Carr: As long as we are going to have an opportunity to present our activities later on. Maybe we are anticipating, your Honor. We considered that question in the preparation of the trial, but we thought in order to play on the [61] safe side—well, then, may I have an exception?

(Testimony of George B. Burnham.)

The Court: You do not need it. This is a civil case. You have an exception to all rulings.

Q. (By Mr. Carr): Mr. Burnham, on or about May 27th, 1929, did you have a discussion with one Dr. H. W. Morris, in Ann Arbor, Michigan, in reference to the alleged infringement by the American Potash & Chemical Company of your patent?

A. Yes.

Q. Who is Dr. Morris?

A. Dr. Morris is one of the chemical engineers connected with the American Potash & Chemical Corporation.

A. Where was that conversation held?

A. In Ann Arbor, Michigan.

Q. Who was present?

A. Just Dr. Morris and myself.

Q. What was that conversation?

Mr. Harrison: That is objected to on the ground it is incompetent, irrelevant, and immaterial, and hearsay.

Q. (By Mr. Carr): What was Dr. Morris' position, if any, with the American Potash & Chemical Company?

A. He was the chemical engineer for the American Potash & Chemical Corporation.

Mr. Carr: Now, your Honor, we submit it.

The Court: Don't you have to establish his official relationship to the company? [62]

Mr. Carr: He has already testified that this gentleman, Dr. Morris, was the chemical engineer.

(Testimony of George B. Burnham.)

The Court: I do not know whether that would get you out of the hearsay rule. Is that all you can establish as to the relationship? This man may have been just an employee of the company. [62-a]

Q. How do you know Dr. Morris was a chemical engineer for the American Potash Chemical Company?

A. That was a matter of common knowledge at the time. He invented some of the processes that American Potash and Chemical Company was using, some of their patented processes for recovering potash and borax.

Q. Had you ever seen him at the office of the American Potash & Chemical Company?

A. No, I don't exactly remember that I saw him in the office, but he carried on these experiments at Ann Arbor and Trona as well.

The Court: You saw him in his own laboratory at Ann Arbor.

The Witness: A. Yes.

Q. (By Mr. Carr): Where did you see him at Trona?

A. I didn't see him at Trona, but he told me his experience in developing the process.

Q. Did he tell you of anything he did with the American Potash & Chemical Company?

Mr. Harrison: That is hearsay, if the Court please.

The Court: Are you seeking to bind the defendant by this?

Mr. Carr: Certainly, your Honor.

(Testimony of George B. Burnham.)

The Court: I will have to sustain the objection unless there is some further foundation for that.

Mr. Carr: Very well.

Q. I forget whether I asked you this or not: How do you know that Dr. Morris was connected with the American Potash & [63] Chemical Company?

Mr. Harrison: That has already been answered.

Q. (By Mr. Carr): Mr. Burnham?

A. He invented a process that was patented and used by the American Potash, but I assumed he was hired by the American Potash & Chemical Company.

Q. Did you ever see him down in the plant at Trona?

A. I don't recall actually seeing him there.

Q. Now, on or about July 1, 1929, was or was not the plaintiff engaged in a controversy pending before the Land Office at Los Angeles?

A. Yes, there was a controversy being heard in Los Angeles.

Q. And what was that?

A. In regard to whether or not the sodium borate deposits in the Kramer Borax District came under the provisions of the Sodium Leasing Act of February 25, 1920.

Q. Will you state briefly what led up to that situation, just so the jury will be familiar with that?

A. A hearing was held before the United States Land Office.

(Testimony of George B. Burnham.)

Q. Your company had filed a claim for certain lands?

A. Our company had filed a claim for certain lands in the Kramer Borax District, known as the Little Placer, and the United States Borax Company, one of the defendants, claimed the same land under the mining laws. So there was a conflict over their application for the land, so the Land Office ordered [64] a hearing for both sides to present their cases, as they each felt they were entitled to the land. The hearing lasted for a month and during the course of the hearing our attorney, Mr. Townsend——

Mr. Harrison: Now, is that responsive to any question you have asked him?

Mr. Carr: No, it is not. Let me ask him this:

Q. At that time your company was represented by what attorney? A. Mr. B. D. Townsend.

Q. And was the defendant the American Potash or the United States Borax Company?

A. The United States Borax Company.

Q. What attorney represented the United States Borax Company in those hearings?

A. Mr. William Colby.

Q. He is an attorney of this city since, or do you know?

A. Of Los Angeles, and maybe of this city, too—I don't know.

Q. At that time and on or about July 1, 1929, was there any discussion between Mr. Townsend and Mr. Colby as to the character of the defendant——

(Testimony of George B. Burnham.)

Mr. Harrison: He can answer that yes or no.

Mr. Carr: Yes.

The Witness: Yes, there was a discussion.

Q. (By Mr. Carr): And what was that discussion? [65]

Mr. Harrison: Now, if your Honor please, we object to this discussion on the grounds in the first place, that a statement of an attorney in the course of litigation, while binding on the client for the purpose of the litigation, is not admissible against that client in another matter. In other words, it is not necessarily binding on the client, but beyond that, on the ground that in the complaint in this action a specific statement on May 17, 1929, is charged and that the issue cannot be enlarged by answering at this time the claim that some other statement was made by one of the representatives of the defendants.

May I say, if your Honor please, in making these objections I would like to have an understanding they may be deemed to be made severally by each of the defendants, so Mr. Aitken and the other defendants do not have to announce them.

Mr. Carr: We will so stipulate.

The Court: Very well. I don't see the materiality of this, Mr. Carr. Are you attempting to show that some attorney for one of the defendants, in some litigation before the Land Office made some statement that this plaintiff relied on in connection with whatever claim he might have against him?

(Testimony of George B. Burnham.)

Mr. Carr: Exactly, your Honor. It is the same situation as the Zabriskie matter and how can your Honor rule without hearing them?

Mr. Harrison: Well, that is letting the evidence in [66] beforehand.

The Court: I think I can without answering your question, but I think you have already told me what this testimony is to be, and I don't see how that would be competent in this case.

Mr. Carr: Well, it will be competent to deny any belief or thought that this plaintiff had that these people were monopolists. That is it exactly.

The Court: You mean some statement an attorney representing some other litigant in some other litigation made to the plaintiff?

Mr. Carr: No, it involved one of the overt acts of the conspiracy charged by us in this complaint. It was one of the overt acts. We were trying to secure the patent or a lease, rather, upon the Little Placer, which was a very valuable piece of ground, and the United States Borax Company or the defendants were trying to keep us out of that particular piece of land and this hearing was to ascertain whether or not the application of the United States Borax Company for a patent on this land under the mineral laws was proper or was our application for a lease under the leasing laws the proper procedure to follow.

The Court: This witness is going to testify, isn't he, that the attorney said his client was not guilty of Anti-trust Law violation? [67]

(Testimony of George B. Burnham.)

Mr. Carr: He did not use those words exactly.

The Court: Well, words to that effect; that is the substance of it?

Mr. Carr: Yes.

The Court: I will sustain the objection. I think that is wholly immaterial and not binding on the defendants.

Mr. Carr: Well, if it destroys anything or if it is a denial, a continual denial all through this conspiracy which is a continuing conspiracy from its inception——

Mr. Harrison: Now——

Mr. Carr (Continuing): ——and if we can show that during all of this period of time or within the period your Honor has stated——

The Court: I don't like to interrupt you, Mr. Carr, but many of these matters we have had under discussion at various preliminary hearings in this matter. I don't see the materiality of any denials. If I claim you owe me twenty dollars and you keep on denying you owe me twenty dollars, I still can make the same contention that you owe me the twenty dollars.

We have this issue in this case: You contended in this case that is a fraudulent concealment.

Mr. Carr: Absolutely.

The Court: I don't see the materiality of that contention. I will sustain the objection. [68]

Mr. Carr: If a man is continuing denying something which is afterwards proved to be correct and true, that is concealment and deceit and fraud. We

(Testimony of George B. Burnham.)

have charged these people with entering into a conspiracy to destroy this plaintiff. Now, we charged them with it during the course of these years. They denied it and we have charged them with it and that in the face of the knowledge that we will in the main case show that—in the face of the knowledge that the charges are correct they keep denying that, that certainly shows concealment and fraud.

The Court: You would have to have some authority to convince me that would be the law. I could not conceive that would be true——

Mr. Carr: You mean, your Honor, you could not conceive if you are charged with fraud——

The Court: Mr. Carr, I have tried hundreds of cases, and so have you. You know that applies in every lawsuit. One side always denies what the other side says. That doesn't mean it amounts to fraudulent concealment.

Mr. Carr: It does if they deny something they know to be true.

The Court: I have seen many lawyers make that representation. You would have to present some authority before I would be willing to sustain your contention that the mere denial of the charge amounts to fraudulent concealment. [69]

Mr. Carr: In the Foster and Kleiser case, which was a treble damage suit against the Foster and Kleiser Company, the complaining witness charged that he talked with the manager of the Foster and Kleiser Company and charged him with the various activities for the purpose of putting him out

(Testimony of George B. Burnham.)

of business and the manager there said yes, he did. That was the purpose of their activities.

Now, in this case this is the converse. The Court in that case goes on to say that the statute will not run if there has been fraudulent concealment. That is the law of the State of California and also of this District and this Circuit. In that case they go into a discussion in Subdivision 7 to 11 there of this matter of fraudulent concealment.

The Court: You say that in that case the California Supreme Court held that the denial of a charge might amount to fraudulent concealment?

Mr. Carr: No, it wouldn't be that. I said that is the converse. That is in our Circuit Court of Appeals, 85 Fed. 2d. and cites the Kimble case, a California case, which was the first one, as your Honor recalls, to get away from the old strict, common-law rule and to hold if a defendant denies the activities which in fact are true, that that is fraudulent concealment. In other words, the Kimble case held it was involved, and the Pashley case and this later case of the Bear Film Company, held where the statute of limitations has been [70] tolled——

The Court: Mr. Carr, if I have a claim against you I don't care under what statute it is, or under what principle of law. I know I have a claim against you. The fact that you deny I have the claim against you does not deter me from proceeding against you, and unless there is something of a fraudulent nature by which I am induced to give

(Testimony of George B. Burnham.)

up a right, or there is something concealed from me, the mere fact that you say you don't owe me money does not enable me to go on year after year and wait and maybe fifteen years later you will finally say, "Well, I admit I owe you the money, but will be too late to bring suit."

Mr. Carr: But in your case you knew you had a claim, but here we didn't know we had a claim.

The Court: Then if you didn't know you had a claim, then there is no occasion for presenting any evidence to the effect that the other side denied it.

Mr. Carr: Yes, because the statute of limitations on the base of the situation had run, but here we were continually trying to find out whether we had a claim under the Anti-trust Law, and as your Honor knows, Sections 1 and 2 provide that those who conspire to ruin another person either by monopolizing or by controlling prices gives that third person a cause of action. Now, where we did not know, we could not know we had a claim——

The Court: If you establish by the evidence that you did not know that, then you have made a proper case to go to the Jury on the special issue. But I don't see the materiality of offering in evidence conversations in which some attorney denied in some litigation that the defendants were guilty of any violation of the Anti-trust Laws.

Mr. Carr: It proves their fraudulent concealment which tolls the statute, your Honor.

(Testimony of George B. Burnham.)

The Court: We have been discussing this somewhat at length and I feel that unless there is some positive authority directly on that point, in my opinion that is wholly incompetent, irrelevant and immaterial.

Mr. Carr: The Bear Film Company case, the Pashley case, and the first case, the Kimble case, as I say, broke away from the old rule.

The Court: I know; I have read many of those cases in connection with this hearing, and you are quite right in your statement of the law that fraudulent concealment is a basis for tolling the statute, but that is not the question I am ruling on. The question I am ruling on is the admissibility or inadmissibility of evidence in support of that claim. It seems to me very clear that is incompetent.

Mr. Carr: We understood at the time of the pre-trial conference that the burden was on us to prove that the statute was tolled. Now, how can we do it except by proving fraudulent [72] concealment? How can we prove it except by showing fraudulent concealment?

Mr. Harrison: Are you finished, Mr. Carr?

Mr. Carr: No, I am not. Come in, anyhow.

Mr. Harrison: I don't want to interrupt.

Mr. Carr: We must prove, as I say, on the surface this action would be barred, but we by proving that we did not know nor could we have ascertained by reasonable diligence that we had a cause of action granted us by Sections 1 and 5——

The Court: I think you misunderstand what I say, Mr. Carr. I did not say that you did not have

(Testimony of George B. Burnham.)

a perfect right to prove there was fraudulent concealment. I am merely ruling on this particular piece of evidence you are now offering, which I have ruled is not competent and is not admissible on that question. I am not holding that you have not the right to show affirmatively in your case that if there was fraudulent concealment of this claim to the detriment of the plaintiff that the Jury can decide that question; but you have just offered now a particular piece of evidence which I hold to be incompetent evidence. That is all.

Mr. Carr: May I make an offer of proof, then?

The Court: Well, if you are going to do that, we will have to excuse the Jury.

Mr. Carr: Well, we won't have to do that now.

The Court: You can do that at a recess period, if you [73] wish.

Mr. Carr: Very well. It seems to us, your Honor, any false statement by the defendants or any of their officers, agents, employees, or attorneys, constitutes a fraudulent concealment.

Mr. Harrison: We submit, if the Court please, Counsel ought not to refer in argument to statements as being false when your Honor has ruled against their admissibility.

Mr. Carr: How can you say they are not false?

Mr. Harrison: I do say they are false.

Mr. Carr: You pled guilty to your complaint.

Mr. Harrison: Now, if your Honor please, I object to that statement on the part of Counsel and I assign it as misconduct.

(Testimony of George B. Burnham.)

The Court: Gentlemen, I hope we are not going to get into lengthy arguments about this matter. That is why I made a preliminary statement to the Jury. The Jury is not to pass upon the merits of the case. There is no presumption here that the plaintiff is right or wrong in this case, as I told the Jury. It is simply a very limited issue in this presentation to the Jury and that is all we have to consider here.

I will sustain the objection to that last question.

I want to advise the Jury at this time that I told you this case presented some little difficulties. These arguments and discussions by the Court and counsel are not evidence in [74] the case and I could perhaps excuse the Jury so you would not have to listen to them, but at any rate, they are not matters that concern you. They are merely discussions of law as to the admissibility of evidence and you are only to consider such evidence as actually comes into the case.

Mr. Carr: I think I will go ahead then. Will your Honor pardon me a moment?

The Court: Certainly.

Mr. Carr: I will try, your Honor, to conform to your Honor's ruling. I think I know what you have in mind.

Q. Now, Mr. Burnham, during the years 1930, 1931, and 1932, do you know if there was any action on behalf of the Pacific Borax Company against the American Potash Company? A. Yes.

Mr. Harrison: That is objected to as incompetent, irrelevant and immaterial, if the Court please.

(Testimony of George B. Burnham.)

The Court: It is very difficult for me to rule on that. I don't know what you are talking about. Did you say, was there any action against the American Potash Company by the Pacific Coast Borax Company?

Mr. Carr: Yes, was there any action by the Pacific Coast Borax Company against the American Potash Company for infringement of a patented process?

The Court: You are speaking of a legal proceeding?

Mr. Harrison: That is clearly immaterial. [75]

The Witness: Yes, there was a legal proceeding.

Mr. Harrison: Just a minute, please.

Mr. Carr: Yes, don't answer, Mr. Burnham, until the Court rules. The answer may go out.

Mr. Harrison: That is objected to as incompetent, irrelevant and immaterial. That has no bearing on the knowledge on the part of this plaintiff or his belief.

Mr. Carr: It is another instance of lulling of this plaintiff, why this plaintiff was lulled into inactivity. It is another illustration.

Mr. Harrison: We object on two grounds, if your Honor please: first, we object on the ground that no such lulling was pleaded and it is incompetent, irrelevant and immaterial. In the absence of any communication to the plaintiff——

The Court: I don't understand what the point is.

Mr. Carr: The Pacific Borax Company brought

(Testimony of George B. Burnham.)

an action against the American Potash & Chemical Company for an infringement of a patent and it was through that action and by that action that plaintiff was led more conclusively to the belief that there was no cooperation between these people and that as Mr. Zabriskie had told them that there was no combination or violation of any Anti-trust Laws.

The Court: How could that be fraudulent concealment if there was a lawsuit between the two of them?

Mr. Carr: But it tended to convince. It was not [76] fraudulent concealment, but I mean as a step which led this plaintiff in this case to the further confirmation of the truth of Zabriskie's and Emlaw's statements.

Mr. Harrison: We submit we are not responsible for that, if the Court please, and it is not material at this point or at all.

The Court: This was an action of record in the courts, was it, Mr. Carr?

Mr. Carr: Yes, your Honor. It went over two or three years.

Mr. Harrison: If there were such a suit there would be nothing fraudulent or concealed about it. We submit it is incompetent, irrelevant and immaterial.

Mr. Carr: It is substantially the reason why Mr. Burnham confirmed his belief in the correctness of the Zabriskie statement.

(Testimony of George B. Burnham.)

Mr. Harrison: In other words, Counsel seems to claim because there was a dispute four years ago after the event between two parties that for some reason or other tends to prove this gentleman's belief in what happened four years before. I don't quite understand, but that seems to be the claim, and we object as utterly immaterial.

The Court: I will sustain the objection, Mr. Carr.

Mr. Carr: Pardon me a moment, your Honor?

The Court: Yes. [77]

Mr. Harrison: May I ask your Honor to state to the Jury that any statements made on matters are not evidence?

The Court: You mean the statements by the counsel?

Mr. Harrison: Yes, statements made by counsel.

The Court: I thought I covered that.

Mr. Carr: Yes.

The Court: I spoke of the arguments by the Court and counsel and I meant to include the statements of counsel as well as the statements of the Court. Neither of them are evidence in the case, ladies and gentlemen.

Mr. Carr: Your Honor will pardon me; in view of your ruling we will have to modify our situation.

The Court: Would you like to have a recess at this time?

Mr. Carr: It might be a good idea and then we can accomplish two purposes.

(Testimony of George B. Burnham.)

The Court: All right. We usually take a recess around three o'clock anyhow. We will take it a little earlier today.

Please bear in mind the admonition of the Court.

(Recess.) [78]

Q. (By Mr. Carr): Mr. Burnham, at any time from May 17, 1929 to October 10, 1939, inclusive, did you believe that the business of the Burnham Chemical Company had been damaged by any acts of the defendant, or some of them, in violation of the Anti-trust Laws of the United States?

A. No.

Mr. Carr: I will skip over; in compliance with your Honor's ruling I will go to just one more:

Q. Mr. Burnham, on or about October 19, 1937 did you have a conference with Mr. Emlaw and Mr. F. C. Baker? A. Yes.

Q. That is the same Mr. Emlaw who you stated was an officer previously of the American Potash & Chemical Company. A. Yes, it is.

Q. Do you know whether or not at that time Mr. F. C. Baker was any officer of that corporation?

A. He is also an officer of the American Potash & Chemical Corporation.

Q. He was at that time?

A. I believe so, yes.

Q. What officer was he, if you know?

A. Well, he was a director, but I know Mr. Emlaw was the president.

(Testimony of George B. Burnham.)

Q. Where was this conference held?

A. In New York City. [79]

Q. In the office——

A. Of the American Potash & Chemical Company.

Q. What was that conversation?

Mr. Harrison: That is objected to, if the Court please, on the ground that no representation by these gentlemen in 1937 is pleaded or relied upon in the complaint. The complaint relies solely upon the representations made by Mr. Zabriskie on May 17, 1929.

The Court: Is this offered along the same line as the testimony with respect to the previous conversation?

Mr. Carr: Yes, your Honor, with Zabriskie.

The Court: I will overrule the objection.

Q. (By Mr. Carr): Will you answer, Mr. Burnham? What was the conversation?

A. That conversation lasted quite a while. First, I asked Mr. Emlaw if his company would be interested in financing our potash lease at Searles Lake, that we were about to lose our potash lease, but if we could have some finances we could continue to hold it, and we would like to know if they would help us in the financing and the development of our leased property.

Mr. Emlaw replied that when they first got their land from the Government in 1918, got their patent to the land, there, from the Government, that they agreed with the Government at that time that they would not finance any other lessee on [80] Searles Lake or any other party on Searles Lake, and

(Testimony of George B. Burnham.)

thereby establish a monopoly; that therefore they would not consider financing our lease, due to the promise they had made to the Government in 1918.

Then I also asked Mr. Emlaw who controlled the American Potash & Chemical Corporation. He said that it was the Goldfields Consolidated of South Africa, that they held 80 per cent of the stock in the American Potash & Chemical Company.

Then I asked Mr. Emlaw, I said, "Why don't you people go into the small package borax business, like the Pacific Coast Borax Company? The Pacific Coast Borax Company put up borax in small packages and sell it as 20 Mule Team Borax. Why don't the American Potash & Chemical Company also put their borax up in small packages and sell it?" I asked him, "Do you have some understanding with the Pacific Coast Borax Company to keep out of the small package business?"

They said, "No, they did not, that there was no understanding between them," and I said, "Well, it would seem the normal thing to get in that line of business, too," and I couldn't understand why they kept away from that business, and wasn't it due to some agreement they had with them.

Mr. Emlaw said no, not at all. The reason they did not get into the small package business is because it required a great deal of advertising and a well organized system of distribution; that the Pacific Coast Borax Company had built up [81] a marvelous system of distributing borax in small packages, and therefore they did not get into that line of business.

(Testimony of George B. Burnham.)

And I said, "Still, is there not some connection between you as a reason why you do not go into the small package business?"

And they said, "No, there is no connection between us, at all, between the two corporations."

Q. Those corporations to which you are referring are what?

A. The Pacific Coast Borax Company and the American Potash & Chemical Corporation.

Mr. Carr: Your Honor, in view of your Honor's ruling, we can go no further with our questions at this time. We do that, however, in view of your Honor's ruling, and with the expectation that we can open up on redirect examination anything that might develop on cross-examination in this proceeding. Cross-examine, Mr. Harrison.

Cross-Examination

By Mr. Harrison:

Q. Mr. Burnham, you testified this morning that you are the president of the plaintiff corporation, Burnham Chemical Company? A. Yes.

Q. That is correct? A. Yes.

Q. And you said you had been president except for a period of a year; did I understand you correctly, or thereabouts? [82]

A. Approximately a year in 1921, and several months along about 1927.

Q. But aside from the months in 1927 you have been president of the Burnham Chemical Company ever since 1922? A. That is right.

(Testimony of George B. Burnham.)

Q. The few months in 1927 were comparatively short, were they not? A. Yes.

Q. And at all times it is fair to say since 1922 you have been acting in executive charge of the business of the plaintiff? A. Yes.

Q. You own a majority of the stock of the Burnham Chemical Company, do you not?

A. Yes.

Q. And that has been true ever since 1922?

A. Yes.

Q. Will you produce, please, Mr. Burnham, your copy of the letter to Mr. Thurman Arnold, dated November 22, 1939?

A. It is in my black suitcase.

Mr. Carr: Get it, Mr. Burnham.

A. This is the copy here, of the letter that I wrote to Thurman Arnold on November 22, 1939.

Q. (By Mr. Harrison): On that day you sent the original of which the carbon copy you hold in your hands is a true copy through the United States mails, did you not? A. Yes. [83]

Q. Mr. Arnold, to whom the letter is addressed, was at that time an Assistant Attorney General of the United States, in charge of anti-trust prosecutions, was he not? A. Yes.

Q. Will you me the letter, please? That was signed by you before it was forwarded?

A. Yes.

Mr. Harrison: We offer the letter in evidence, if the Court please, as Defendants' Exhibit A.

(Testimony of George B. Burnham.)

(The document in question was thereupon received in evidence and marked Defendants' Exhibit A.)

Q. (By Mr. Carr): Have you an extra copy of that letter?

A. No, that is the only one I have.

Mr. Carr: You are going to read it?

Mr. Harrison: I will read it, yes.

The Witness: Wait a minute. Maybe I have an extra copy. Yes, I had forgotten I do have another copy (handing a copy of Defendants' Exhibit A to Mr. Carr.)

Mr. Harrison: Ladies and gentlemen of the jury, this is Defendants' Exhibit A, which has just been introduced in evidence:

“Washington, D. C., November 22, 1939.

“Mr. Thurman W. Arnold,
Assistant Attorney General,
Department of Justice,
Washington, D. C.

“Attention: Mr. Wendel Berge.

“Dear Sir:

Referring to a conversation which I had with Mr. Berge the other day, I understand that the Anti-Trust Division of the Department of Justice is investigating the alleged violation of the Sherman Anti-Trust Laws by the Fertilizer Industries. Pot-

(Testimony of George B. Burnham.)

ash is one of the principal fertilizer ingredients used by agriculturalists and much of the potash produced in this country comes from Searles Lake, in California. The value of the borax and other boron chemicals produced from Searles Lake is about equal to the value of the potash. Both chemicals are recovered from the brine during its process of treatment. Therefore, the selling price of potash is dependent somewhat on the selling price of borax. The American Potash & Chemical Co. is producing all the potash now made at Searles Lake, Calif. The only other source of potash in the United States besides Searles Lake is the Carlsbad potash field in New Mexico. The principal producer there is the United States Potash Co. and it is controlled by the Pacific Coast Borax Co., who produce borax at Kramer, California. Therefore, this borax producer also has an influence over the price of potash. The American Potash & Chemical Corporation and the Pacific Coast Borax Co. are both English-owned companies, and the two together constitute the British Borax Trust. Hence, [85] the price of potash in America is practically under the control of the British Borax Trust.

The Burnham Chemical at one time had a Government lease at Searles Lake, and was planning to make potash, borax and other chemicals from that deposit. We completed a plant in 1928 for the production of borax, and we expected, through the profits we made in borax, to add a potash plant and

(Testimony of George B. Burnham.)

also make other chemicals and gradually grow to become a large producer. Borax was selling for over \$60.00 a ton f.o.b. Searles Lake, and the Burnham Chemical Co. estimated it could produce borax for \$25.00 a ton in a small plant with its patented solar processes; and so make sufficient profit to enable it to grow and make potash and other chemicals.

However, the very month the Burnham Chemical Co. started production of borax, in June, 1928, a drastic cut in the price occurred, with the result that, in a few months, we were forced out of business. From outward appearances, it appeared that the price war on borax was between the two big English producers—namely, the American Potash & Chemical Corporation and the Pacific Coast Borax Co. The fact that the main price cutting in the price war started the month we began production convinces us that it was aimed purposely to destroy us. At least that was the resulting effect of the price war. [85-A]

We took the matter up with our attorneys, Francis J. Heney and B. D. Townsend, to see if we did not have a case against the Trust for violating the Sherman Anti-Trust Laws. These attorneys, who are now both deceased, felt that we had a case, but we were so completely ruined as a result of the price war, and also in debt, that we were financially unable to employ the attorneys to go ahead with the matter.

As time goes on, more evidence has been gathered to show that the two British-owned borax and pot-

(Testimony of George B. Burnham.)

ash producers in this country are building up a monopoly to drive out all American competition. And so, since you are making an investigation of the fertilizer industries, I am bringing our situation to your attention at this time.

Enclosed you will find a copy of a letter written by Mr. B. D. Townsend to H. S. Hinrichs, dated July 26, 1928, in which Mr. Townsend points out certain features of the unfair methods of competition being used by the British Borax Trust.

There is also enclosed the preliminary draft of an article entitled "Foreign-Owned Monopoly vs. the People of the United States." It is really a history of the Burnham Chemical Co. This article is not completed and should be treated confidentially until such time as the author desires to put it in finished form.

I am also enclosing a letter dated November 18, 1939, [85-B] which I have just written to the Secretary of the Interior, asking that we be granted a new lease on Searles Lake, and suggesting Government financial aid to develop the lease. There may be something in all the enclosed data which will be helpful to you.

If there is anything further that I can do to assist you in your investigation, I will be very happy to do so.

Yours very truly,

G. B. Burnham,

214 E. C. Lyon Bldg.,

Reno, Nevada."

(Testimony of George B. Burnham.)

Q. (By Mr. Harrison): Now, you testified this morning and this afternoon that you believed what Mr. Zabriskie had told you until the year 1944, did you not? A. Yes.

Q. I will ask you if you recall giving your deposition in this case during February and March of this year? Do you recall giving your deposition?

A. Yes.

Q. I will ask you whether, on March 14, 1947, you gave this testimony under oath. I am now reading from page 476. Have you a copy there, Mr. Burnham? A. Yes.

Q. I will be glad to have you follow this with me. I am reading from page 476, line 12:

“Q. You mean to say that when in 1928 or 1939 the [86] American Potash & Chemical Corporation openly went to the Department of the Interior and openly bid for more land, that made you think that in 1928 their price-cuts were a conspiracy with the Pacific Coast Borax Company to drive you out of business?

A. Well, I believe Zabriskie and Emlaw—I believed they were trying to tell the truth until November, 1939, when lo and behold, they were attempting to get all of Searles Lake, or nearly all of Searles Lake.

Q. So in November, 1939 you no longer believed that they had told you the truth?

A. Well, I was wondering then. These new things had come up that did not coincide with what they had told me.”

(Testimony of George B. Burnham.)

Did you so testify?

A. Yes.

Q. I call your attention also to your testimony two pages later, page 478 of the deposition, line 6. The question was:

“Q. So when you decided in 1939 that he,” that is Emlaw, “had not been telling the truth——

A. Yes.

Q. (Continuing)——that led you to believe that in 1928 the price cuts had been aimed at you after all, is that not so?

A. I was getting suspicious again. I was wondering. I had no knowledge or no facts but here on October 19, 1939, [87] the American Potash & Chemical Corporation was bidding for nearly all of Searles Lake and the Pacific Coast Borax Company did not put in any bid. Did they have an understanding between them not to bid against each other? Those are the things that I was turning over in my mind in November, 1939.”

Did you so testify?

A. Yes.

Q. And after having given your deposition you went over the deposition and made any corrections that you desired, did you not? A. Yes.

Q. And you did not make any correction in that testimony, did you?

A. Except that one word “was” was inserted.

(Testimony of George B. Burnham.)

Q. The word "was" was transposed and I read it as corrected, did I not?

A. That is right.

Q. You referred in your complaint in this case, in paragraph 73, to the fact that on or about June 20, 1925, a Post Office fraud order was issued against the plaintiff and yourself as president, and all mail sent to the plaintiff at its office in Reno, Nevada, was ordered returned to the sender, and you alleged that at that time you had a certain package business, and that upon the issuance of the fraud orders the plaintiff [88] was prevented from receiving through the mails the said orders for said packaged borax and was obliged to commence the production and sale of borax in carload lots; you recall those allegations, do you not? A. Yes.

Mr. Carr: I would like to enter an objection to any reference to the complaint. We offered it in evidence this morning, or rather, offered to read it, and your Honor sustained an objection and said we were not entitled to that, and you instructed the jury, as I recall, that the allegations of the complaint had nothing to do with the situation—maybe not in so many words, but in effect—and on the further order of your Honor you required the testimony in this matter to be confined between the dates of May 17, 1929 and October 10, 1939, so that this has no bearing on the situation, at all. It is incompetent, irrelevant, and immaterial, and your Honor having refused us the right to introduce the complaint, no reference should be made to it at this time.

(Testimony of George B. Burnham.)

The Court: All I ruled was there was no necessity of reading the complaint to the jury.

Mr. Carr: We asked the privilege of doing so.

The Court: If you want to call attention to some portion of the complaint in order to identify some subject-matter in your examination, you will have the same privilege as Mr. Harrison has. [89]

Mr. Carr: We take it in view of your Honor's ruling this morning there can be no reference to anything in the complaint.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): I call your attention, Mr. Burnham, to a certified copy of the Order of the Post Office Department, dated June 20, 1925, and ask you if that is the order referred to in your complaint.

Mr. Carr: For purposes of this trial, your Honor, we renew our objections to this. This antedates the time and period fixed in your pre-trial order, and has no reference whatsoever to the issue. It is not proper cross-examination.

Mr. Harrison: We want to show the knowledge of the witness.

Mr. Carr: May I finish?

Mr. Harrison Excuse me.

Mr. Carr: It is not cross-examination.

The Court: What is the necessity for putting that in, Mr. Harrison?

Mr. Harrison: Well, simply as a foundation, if the Court please. We want to show that the witness

(Testimony of George B. Burnham.)

knew of that order, and then we want to show what statements he made in respect to it in his pleadings in the Carson City suit.

The Court: I think that would be admissible in evidence, but I do not see the relevancy of the Post Office Order, itself, because that antedates any statement the witness may have made. [90]

Mr. Harrison: It is simply a foundation to show the allegation of the complaint, and show the jury what the plaintiff was referring to in that amended complaint, which we propose to offer next in evidence.

The Court: I see no objection to your offering the statements you referred to in your opening statement that were under the signature of the plaintiff in the pleadings in the case. Unless it is necessary to connect it up later, I will sustain the objection without prejudice to the renewal of this offer.

Mr. Harrison: Then may we have the certified copy of the Fraud Order marked for identification?

The Court: Yes, you may have it marked for identification.

(The fraud order in question was thereupon marked Defendants' Exhibit B for Identification.) [91]

Q. (By Mr. Harrison): Now, you recall the fact that the Burnham Chemical Company did file a suit in the District Court for the District of Nevada for the purpose of enjoining the enforcement of that fraud order, do you not? A. Yes.

Q. It is a fact, is it not, that on April 16—

Mr. Carr: Pardon me, may I have a running objection on all questions involving the fraud order

(Testimony of George B. Burnham.)

complaint in Nevada? I object on the ground it is incompetent, irrelevant and immaterial, and antedates the period of time fixed by you Honor in the pre-trial order.

The Court: I don't know what you mean by a running objection.

Mr. Carr: I want to make an objection to each one of them, then.

The Court: Yes, you can make an objection to each question and I will consider each objection. I will overrule your objection now.

Mr. Harrison: We offer in evidence, if the Court please, a certified copy, a photostatic copy of the amended complaint in the case of Burnham Chemical Company against George F. Smith, Postmaster, filed in the District Court of Nevada, April 16, 1926.

The Court: April 16, 1936?

Mr. Harrison: 1926. [92]

Mr. Carr: We renew our objections on all grounds previously stated, if your Honor please.

The Court: Objection overruled.

Mr. Carr: Will that be Exhibit C?

The Clerk: Exhibit C, that is correct.

(The document in question was thereupon received in evidence and marked Defendants' Exhibit C.)

Mr. Carr: We would like to add to those objections that Counsel in his opening statement stated the true facts, which were that subsequently the Federal Court in Nevada issued a restraining order

(Testimony of George B. Burnham.)

setting aside this fraud order which had been made and decided the matter in favor of the plaintiff and restrained the Postmaster from proceeding under such claimed fraud order.

Mr. Harrison: We object to the statement of Counsel as being a misstatement of the fact, not intentional, of course, but none the less misleading. There was no final decision in this case except a dismissal for lack of prosecution. There was a temporary injunction, but we will come to that in a moment, of course; but statements made that are not matters of record have no place here.

Mr. Carr: There was a restraining order issued, restraining the Postmaster from proceeding further with the fraud order.

Mr. Harrison: Only during the pendency and not upon the merits, and in the action upon the merits the case was [93] dismissed for lack of prosecution.

Mr. Carr: And without any notice to plaintiff. Will you stipulate to that, or will you stipulate without any knowledge or notice to the plaintiff?

Mr. Harrison I will not.

The Court: What was your next procedure?

Mr. Harrison: We have offered in evidence the complaint, if the Court please.

The Court: Yes. Now, do you wish to read some parts of it to the jury?

Mr. Harrison: Yes, your Honor.

The Court: All right.

(Testimony of George B. Burnham.)

Mr. Harrison: This is a long document.

The Court: Can't you summarize it in some way?

Mr. Carr: Pick out what you want, Mr. Harrison.

Mr. Harrison: In a general way, this is a statement at some length of the grounds on which the Burnham Chemical Company claims that the Postmaster should be enjoined from enforcing the fraud order. There are certain and very specific and limited parts of it that I should like to read to the jury.

Have you a printed copy of that, Mr. Carr?

Mr. Carr: Yes, we have it here somewhere.

Q. (By Mr. Harrison): I am going to ask you some questions about this, Mr. Burnham, and I have a printed copy of this, [94] so you can follow it, if you wish, because I may wish to ask you some questions about it as I read this to the jury.

(Addressing Mr. Carr): If you have no objection, Mr. Carr, I will read from the printed copy.

Mr. Carr: Yes, but just give me the page.

Mr. Harrison: Page 18, the last clause in Paragraph 8, beginning at Line 13. That reads as follows:

“On February 26, 1925, Dr. Stewart, in response to said letter and pursuant to the aforesaid authority delegated to him by the Secretary of the Interior (at the request of the Postmaster General), submitted to the Post Office

(Testimony of George B. Burnham.)

Department a certain document which is self-named 'A Report,' but the true nature and character of which is hereinafter more accurately described. The contents of said so-called 'report' and the official opinions and actions of Dr. Stewart in the premises, were influenced by certain false and defamatory propaganda and other acts on the part of the competitors of the Burnham Chemical Company, the particulars whereof are essential to a correct understanding of Dr. Stewart's so-called 'report', and therefore will be set forth in the next succeeding paragraph, and before setting forth the particulars concerning said so-called 'report'—

Q. Now, Mr. Burnham, who was Dr. Stewart referred to in that statement? [95]

A. He was one of the officials in the Bureau of Mines of the Department of the Interior.

Q. And he had been requested by the Postmaster General to look into the matter of these charges against your company, had he not?

A. He was appointed by the Secretary of the Interior.

Q. And the Secretary of the Interior appointed him at the request of the Postmaster General, did he not? A. Yes.

Q. And he subsequently made the report referred to in this allegation?

A. He made the report. He did not go into the plant.

(Testimony of George B. Burnham.)

Q. But he made the report? A. Yes.

Q. And that is the report which is referred to here? A. Yes.

Q. Then, you refer in this statement to certain false and defamatory propaganda and other acts on the part of the competitors of the Burnham Chemical Company: What competitors did you refer to when you made that allegation?

A. I had in mind all the competitors.

Q. Well, who were the principal competitors?

A. American Potash & Chemical Company and the Pacific Coast Borax Company.

Q. Defendants in this case? [96]

A. Yes.

Q. Now, I will read the title to the next paragraph—immediately following, Mr. Carr.

IX is entitled, in black print, “Defamatory Propaganda by Borax Trust Against Burnham Chemical Company and Burnham Solar Process.”

To whom did you refer by the terms “Borax Trust” in the title of Paragraph IX?

A. I referred to the American Potash & Chemical Company and the Pacific Coast Borax Company as that was the customary name in the trade to designate them.

Mr. Harrison: I move to strike out everything beginning with the words, “as that was the customary name.”

The Court: Yes, that may go out.

(Testimony of George B. Burnham.)

Mr. Harrison: I read from the bottom of the same page at Line 49:

“Thus, not only will both of said companies be affected as competitors by the developments and operations of the Burnham Chemical Company, but both of them are interested in preventing the Burnham Chemical Company, or any other lessee of the Government, from developing or operating any plant or process for the recovery of any of the salts contained in the brine of Searles Lake.”

Q. “Both of said companies” were the Pacific Coast Borax Company and the American Potash & Chemical Company, were they [97] not?

A. Yes.

Mr. Harrison: I continue to read now, following that.

Mr. Carr: Page, please?

Mr. Harrison: Page 19, Line 3:

“By reason of the premises, for more than six years last past, said competitors have engaged in efforts (most of them in secret) to injure and discredit, and prevent the success of, the ‘processes, plans and developments’ of the Burnham Chemical Company. For example: When Mr. McKean visited Searles Lake in September, 1923, as hereinbefore stated, the chief chemist of the American Trona Corporation endeavored to prejudice the Post Office

(Testimony of George B. Burnham.)

Department against the Burnham Chemical Company and its process, by making certain defamatory statements to Mr. McKean."

Q. Now, "said competitors," as referred to in that sentence means the defendants in this case, American Potash & Chemical Company and Pacific Coast Borax Company, does it not?

A. Yes, and the American Trona Corporation.

Q. Well, the American Trona Corporation was simply the former name of the American Potash & Chemical Company, isn't that correct, Mr. Burnham?

A. Yes, that's correct.

Mr. Harrison: Reading further in the same paragraph from [98] Line 17:

"And thereafter said subject was again brought to the attention of the Post Office Department, and the Postmaster General (acting through the aforesaid Mr. Hassell) was persuaded to, and did, request the designation of a chemical engineer of the U. S. Bureau of Mines to make an investigation and report concerning the 'processes, plans and developments' of the Burnham Chemical Company; and Dr. Stewart was assigned to conduct or supervise such investigation and make such report; all as hereinbefore more particularly set forth.

"While these plaintiffs cannot state who induced the reopening of said investigation as aforesaid, plaintiffs do allege that the officers and agents of the aforesaid competitors of the

(Testimony of George B. Burnham.)

Burnham Chemical Company well knew of said assignment of Dr. Stewart and the antecedent facts in the premises hereinbefore stated; and further knew that the Burnham Chemical Company was then about to commence the production of borax. Thereupon, the aforesaid competitors resumed and increased their aforesaid efforts to injure and discredit, and prevent the success of, the 'processes, plans and developments' of the Burnham Chemical Company. Their ultimate objects in the premises were, first to prejudice the general public against the Burnham Chemical Company, so as to defeat the efforts [99] of the company to finance its enterprise through the sale of its capital stock to the public; second, to discourage dealers in borax from dealing with the Burnham Chemical Company, by convincing them that the Burnham Chemical Company would not be able to develop and maintain a dependable production, because of its financial weakness and because of a doubt (falsely induced by said competitors) concerning the practicability of its process. Their immediate object was to prejudice and deceive the Postmaster General and the officers and agents of the Post Office Department engaged in conducting said investigation, and particularly Dr. Stewart and the other officers and agents of the U. S. Bureau of Mines engaged therein as aforesaid, and thereby procure and induce the issuance of a fraud order against the Burnham

(Testimony of George B. Burnham.)

Chemical Company and Mr. Burnham individually. To that end, among other things, the aforesaid competitors of the Burnham Chemical Company, through their officers and agents, influenced, procured and induced the false and defamatory propaganda concerning, and attacks upon, the Burnham Chemical Company and Mr. Burnham individually, hereinafter set forth.

“On August 25, 1924, a false and defamatory editorial, intended to injure and discredit the Burnham Chemical Company and its processes and Mr. Burnham individually, [100] was published in ‘Chemical and Metallurgical Engineering’, a trade journal devoted to the subject of chemical and kindred industries and having a national and international circulation.

“On November 8, 1924, an editorial of like import and intent, was published in ‘Engineering and Mining Journal-Press’, another trade journal devoted to the subject of chemical and kindred industries and having a national and international circulation.

“On September 8, 1924, Mr. Burnham was expelled from the American Chemical Society (of which he was a member) upon the sole ground that in the advertising literature of the Burnham Chemical Company, Mr. Burnham had published the fact that he was a member of said society, as an evidence of his qualifications and standing as a chemist.

(Testimony of George B. Burnham.)

“During the fall of 1924 and early in the year 1925, numerous prospective purchasers of stock in the Burnham Chemical Company addressed to the American Trona Corporation inquiries concerning the Burnham Chemical Company, and in answer thereto the American Trona Corporation referred the writers of said inquiries to one or both of the aforesaid trade journals for information upon the subject, well knowing (and intending) that they would receive in reply the false and defamatory statements contained in said editorials.” [101]

Q. As we have said, American Trona was the former name of the American Potash & Chemical Company. A. Yes.

Mr. Harrison: Continuing at Line 14 on Page 20:

“By means of said false and defamatory editorials and otherwise, during the fall of 1924 and the early part of 1925, said competitors of the Burnham Chemical Company discouraged dealers in borax from purchasing any of the small quantity of borax which the Burnham Chemical Company then had on hand, and thereby, and otherwise, created the conditions stated and complained of by Mr. Burnham in his letter to Mr. Varley dated February 4, 1925, as hereinbefore stated.

“The officers and agents of said competitors of the Burnham Chemical Company caused said

(Testimony of George B. Burnham.)

defamatory editorials to be brought to the attention and knowledge of Dr. Stewart, within a few days after they were published, respectively, and conveyed to Dr. Stewart divers other false and defamatory statements in the premises, including the false statement (hereinafter mentioned) to the effect that two companies acquired the right to use the Burnham Solar Process, without utilizing it.

“Plaintiffs are informed and believe, and therefore allege, that the aforesaid publication of said defamatory editorials and the aforesaid expulsion of Mr. Burnham [102] from the membership of said society were instigated, induced and procured by, or through the influence of, certain officers and agents of the aforesaid competitors of the Burnham Chemical Company (which officers and agents were intimate friends of the editors of said trade journals and were also officers and members of the American Chemical Society) for the immediate purpose (among others as hereinbefore stated) of influencing the official opinion and action of Dr. Stewart in the premises, and (through Dr. Stewart) the official opinion and action of the officers and agents of the Post Office Department, and particularly the Solicitor for the Post Office Department and the Postmaster General, in the investigation, consideration and disposition of the aforesaid charges against the

(Testimony of George B. Burnham.)

Burnham Chemical Company and Mr. Burnham individually. During all of said times, Dr. Stewart was a member of the American Chemical Society, an intimate friend of the secretary of said society, an intimate friend of the editors of said trade journals, and an intimate friend of many of said officers and agents of the aforesaid competitors of the Burnham Chemical Company, and particularly the vice-president (and consulting chemist) of said American Trona Corporation, who was also an intimate friend of the editors of said trade journals, and a member and an officer of the American Chemical [103] Society; and both the Pacific Coast Borax Company and the American Trona Corporation, as corporations, respectively, were members of the American Chemical Society, and liberal patrons of said trade journals.

“Plaintiffs are informed and believe, and therefore allege, that the aforesaid false and defamatory propaganda and attacks did influence the official opinion and action of Dr. Stewart in the premises; and thereby, and otherwise, did influence and induce the subsequent official opinion and action of the Solicitor for the Post Office Department and the Postmaster General, respectively, as hereinafter set forth.”

Then, at the top of the next page——

Mr. Carr: What page?

(Testimony of George B. Burnham.)

Mr. Harrison: Page 21: The heading of Paragraph X reads as follows in bold type:

“False and Misleading ‘Report’ by Dr. Andrew Stewart Concerning Investigation by U. S. Bureau of Mines.”

On that same page, Subdivision (b) reads as follows:

“Notwithstanding the premises, influenced by the aforesaid false and defamatory propaganda and attacks instigated by the officers and agents of the competitors of the Burnham Chemical Company, Dr. Stewart submitted to the Postmaster General a certain document dated February 26, [104] 1925, which was entitled and purported to be a ‘report’ of the results of the investigation by the U. S. Bureau of Mines of the ‘processes, plans and developments’ of the Burnham Chemical Company; but which in fact concealed and misrepresented the true facts in the premises, and consisted mainly of a repetition of the false and defamatory propanganda disseminated by the competitors of the Burnham Chemical Company as aforesaid, disguised in new verbiage, and presented to the Postmaster General and the Post Office Department, ostensibly as the impartial views of the U. S. Bureau of Mines.”

The next is on Page 24 at Line 11:

“that the difficulties encountered by Mr. Burnham in marketing said small amount of borax

(Testimony of George B. Burnham.)

then on hand were created by the aforesaid competitors of the Burnham Chemical Company for the express purpose, among other things, of discrediting the Burnham Chemical Company and furnishing some false and fictitious ground upon which a fraud order could be based; and that said monopolistic restraint of the commerce in borax was and is a flagrant violation of the laws of the United States, and could and should be prohibited by criminal and civil proceedings instituted by the United States; and Dr. Stewart further knew that said circumstances demanded the prosecution of the Borax Trust under the Anti-Trust Laws of the United States, but [105] did not warrant or justify the prosecution of the Burnham Chemical Company or Mr. Burnham under the Postal Laws of the United States.”

Q. You refer to the defendant American Potash & Chemical Company and Pacific Borax Company, do you not? A. Yes.

Mr. Harrison: The next is on Page 25, at Line 4, which reads as follows:

“By reason of the premises, Dr. Stewart’s so-called ‘report’ was in effect a complaint or petition on the part of the competitors of the Burnham Chemical Company, with the true authorship of said document concealed, to procure and induce the issuance of a fraud order in the premises, for the purpose of destroying

(Testimony of George B. Burnham.)

the Burnham Chemical Company, and thereby averting competition (otherwise inevitable) in the production of borax, potash and other salts from the brine of Searles Lake; and for the further purpose of enabling the Borax Trust to maintain its monopoly of the commerce in borax, in violation of the laws of the United States.” [106]

The next is page 73. Paragraph XXVIII of the complaint is entitled in bold type: **Attitude of Stockholders Since Issuance of Fraud Order.** This reads as follows:

“Since the promulgation of the fraud order as above stated, the Burnham Chemical Company and Mr. Burnham have communicated the general circumstances thereof to each and all of the stockholders. Many of the stockholders have responded to these communications. Almost unanimously they have expressed implicit confidence in, and approval of, the Burnham Chemical Company and its officers.”

Now, referring to line 47, page 73:

“Prior to the time of the issuance and promulgation of the fraud order, the Burnham Chemical Company and its officers enjoyed a good reputation, and good commercial credit. The immediate effect of the fraud order was to taint the reputation of the company and its officers with suspicions of fraud and dishonesty, and greatly impair their commercial

(Testimony of George B. Burnham.)

credit. With its credit impaired, and its financial resources virtually destroyed, the company has become involved in heavy legal expenses, for the purpose of annulling the fraud order which has been unjustly and unlawfully issued and promulgated as hereinbefore stated. In the meantime, the company must enter into competition with a strongly entrenched foreign-owned [107] trust, which controls nearly 90 per cent of the borax trade of the world, and which is keen to take advantage of every weakness of its competitors. Already, the fact of the issuance of the fraud order and the effects of it have been extensively published and advertised with every possible derogatory and damnifying insinuation and innuendo."

Now, referring to paragraph XXX on page 75, which is entitled: Additional Facts Concerning Efforts of Borax Trust to Preclude Development of Burnham Solar Process; Concealment Thereof from Solicitor and Postmaster-General.

As part of that paragraph. on page 76 at line 13 the following reads:

"Plaintiffs allege that by their unlawful violation of their contractual obligations, and their subsequent unlawful assertion of rights adverse to Mr. Burnham as hereinbefore stated, the Pacific Coast Borax Company and the Solvay Process Company intended, and attempted, to render Mr. Burnham financially helpless and

(Testimony of George B. Burnham.)

permanently preclude the development of the Burnham Solar Process, for the reason that it would virtually destroy the value of their existing plants, constructed and installed to operate under more expensive processes, with an investment exceeding \$30,000,000.

“The Pacific Coast Borax Company also endeavored to preclude the development of the Burnham Solar Process, by means of their application for a lease of virtually all of the public land at Searles Lake, suitable for solar ponds, as hereinbefore stated. Had said application been granted, it was the intention of the Pacific Coast Borax Company to construct solar ponds covering said entire area of 3100 acres; and such ponds would have been of sufficient capacity to have enabled the Pacific Coast Borax Company, within five years, to have exhausted the entire chemical deposit of Searles Lake, and to have transferred it to the ponds of the Pacific Coast Borax Company; and thereby the Pacific Coast Borax Company would have secured virtually a permanent monopoly of the production of potash and borax in the United States, so far as concerns the present known deposits thereof. It was upon this ground, among others, that Mr. Burnham protested against, and the Secretary of the Interior denied, said application for lease by the Pacific Coast Borax Company, acting through its subsidiary as hereinbefore stated.”

(Testimony of George B. Burnham.)

Q. Those statements are contained in the complaint, are they not, Mr. Burnham?

A. Yes.

Q. And you signed that and verified that on April 9, 1926, did you not? A. Yes.

Q. And you declared under oath those facts were true of your [109] own knowledge, except as to the matters stated on information and belief, and as to those matters you believed it to be true?

A. Yes, and I signed the document.

Q. That is what it states, does it not? Will you read it, if you have any doubt about it? Read that last page. A. Yes.

Q. You so stated? A. Yes.

Q. Have you that diary for 1925, the little notebook. A. Yes, I have it here.

Q. Will you turn to the entry about June 23, 1925, to June 30, 1925, which relates to the Post Office fraud order?

A. Do you know how the entry begins to read?

Q. "We draw upon the source of the complaint. We prefer not to surmise."

A. Yes, I have it here.

Q. And that appears about what date?

A. It was after June 23, 1925, and before June 30, 1925.

Q. Does that memorandum state your own reflections at that time? A. No.

Q. What does it state?

Mr. Carr: We object to that, may it please your Honor, upon all of the grounds previously stated;

(Testimony of George B. Burnham.)

that antedates the [110] fixed dates by your Honor and is incompetent, irrelevant and immaterial, by reason of such order by your Honor.

The Court: I will overrule the objection. You have stated several times, Mr. Carr, that it antedates the order fixed by me. I made no order limiting the testimony in the case.

Mr. Carr: Your pre-trial order states, may it please your Honor, in so many words, "At any time from May 17, 1929,"—that you were going to ask the jury to decide this matter with regard to the dates between May 17, 1929, to October 10, 1939, during that time did plaintiff know or have good cause to know. Your Honor fixed definite times between which this knowledge must have been had.

The Court: I understand that, but that did not mean that the party could not put in evidence of some statement either prior or after that time that would reflect the state of mind or belief of the party during that period. I did not intend to limit the evidence in the case.

Mr. Carr: Very well, your Honor.

The Court I merely state that because you made a statement several times that I made an order limiting the time. I have not attempted to do that.

I will overrule the objection. [111]

Q. (By Mr. Harrison): Now, the entry we have been discussing, Mr. Burnham, was made sometime between June 23, 1925 and June 30, 1925, was it not? A. Yes.

(Testimony of George B. Burnham.)

Q. And that was only a few days after the Fraud Order was issued, was it not? A. Yes.

Q. Will you read the entry, please, that was in your own handwriting? A. Yes.

Mr. Carr: Same objection, your Honor.

The Court: Same ruling.

The Witness: I will read just as it is written here.

Q. (By Mr. Harrison): If you will, please.

A. "We do not know upon the source of the complaint. We prefer not to surmise as we are leaving it to attorneys. We do not intend to indulge in any surmises. We have no means of knowing who started it, but it is evident who will be benefitted by it. Production equals that of Trona. We are now casting about ways of saving the situation. Money can't be sent by mail but com—" and the sentence is not finished. "I am wiring the balance of the money I owe them. I would rather fight than surrender. How do you feel about it?"

That is all.

Q. When you said in that memorandum that you do not know the [112] source of the complaint, you referred to the complaint in the Post Office Department, did you not?

A. These are not my thoughts.

Q. Whose thoughts are they?

A. Francis Heney's thoughts.

(Testimony of George B. Burnham.)

Q. Mr. Francis J. Heney was your attorney at that time? Yes.

Q. He was quite well known, was he not?

A. Yes.

Q. Do these represent the things that Mr. Heney told you?

A. Yes, we were at a meeting, Mr. Heney, Mr. Townsend, and myself, right after the Post Office Fraud Order was issued, and Mr. Heney said that we must write a letter to all the stockholders, telling them what had happened.

Q. Did this represent the suggestion of Mr. Heney as to what should be written the stockholders?

A. Yes, Mr. Heney started, "Now, let's see what we'll say. We will start out this way," and started to dictate a letter, and I wrote down hurriedly his thoughts.

Q. That expressed your belief and state of mind at the time, did it not, when you said, "We prefer not to surmise and are leaving it to attorneys?"

A. That is what Mr. Heney was dictating to me and I was writing it down.

Q. Is it not a fact, Mr. Burnham, that at that time when Mr. [113] Heney made that statement to you, you also had in mind that you did not desire to accuse anybody of having been responsible for getting the Fraud Order until you had something more than a mere surmise?

A. I don't remember exactly what my thoughts were, but these thoughts are the thoughts of Mr. Heney.

(Testimony of George B. Burnham.)

Q. I am asking you now your best recollection as to whether or not that represented your state of mind, that you did not desire to accuse anybody of responsibility for the Fraud Order on the basis of a mere surmise?

A. Yes, that was my thought.

Q. That was your thought at the time, and that continued to be your thought during the following months, did it not? A. Yes.

Q. Do you recall the affidavit which you filed in this case, which was subsequently printed by you and distributed, with respect to your activities in this case? A. This affidavit?

Q. Yes.

Mr. Carr: Which case?

Mr. Harrison: This present case.

The Witness: Yes.

Q. (By Mr. Harrison): I call your attention, Mr. Burnham, to your reference in that affidavit which you filed in this case——

The Court: The case on trial? [114]

Mr. Harrison: The case on trial, if the Court please.

Q. (Continuing): ——and particularly to the reference which appears on page 6 of the typewritten affidavit in the first column of page 2 of the printed affidavit, referring to the amended complaint in the Post Office Fraud Order case, and I call your particular attention to the statement there as follows: “Said plaintiff based its charges——” referring to the charges in the amended complaint

(Testimony of George B. Burnham.)

——“largely upon hearsay and upon the grounds that said plaintiff had done nothing fraudulent.” You recall having made that statement in your affidavit, do you not?

A. Yes, that is under Section A.

Q. Under Section B. A. Oh.

Q. Do you see it there? “Said plaintiff based his charges”——and those are the charges in your amended complaint which I read to the jury——“largely upon hearsay and upon the grounds that plaintiff had done nothing fraudulent.”

A. I do not see it here but it must be there.

Q. Just to save time, Mr. Burnham, I will indicate it to you (indicating). A. Oh, yes.

Q. Now, I would like to direct your attention to that statement [115] and ask you what hearsay, what reports you had received upon which you based these charges in the amended complaint that the Borax Trust had influenced Dr. Stewart and had induced the Fraud Order.

Mr. Carr: We renew our objection, and furthermore, it is incompetent, irrelevant, and immaterial. This is not impeachment nor is it cross-examination.

The Court: What is the competency of this?

Mr. Harrison: I will put it more directly, if the Court please.

Q. Is it not a fact that Dr. Atwood and other stockholders of the company had informed you that these competitors of yours were endeavoring to injure you and bring about the adoption of the fraud order?

(Testimony of George B. Burnham.)

Mr. Carr: We renew our objection upon all the grounds stated, and in addition it is not cross-examination, nor is it impeachment in any sense of the word of the testimony.

The Court: Are you asking this question to show knowledge?

Mr. Harrison: Knowledge, if the Court please.

The Court: I will overrule the objection.

Q. (By Mr. Harrison): Did you understand the question?

Mr. Carr: It could not be knowledge if it was given by a third party. The hearsay rule would apply.

Mr. Harrison: We are entitled to show knowledge conveyed [116] to him, if the Court please.

Mr. Carr: It is just what somebody else told him, not knowledge on his part.

Mr. Harrison: Under that theory we could not show knowledge except by showing he was actually present when something was done.

Mr. Carr: Certainly. Suppose somebody came to him on the street——

The Court: I will overrule the objection.

Mr. Carr: Suppose somebody came to him on the street and told him that. Would that be knowledge?

The Court: That is not the case here. The question is directed to information as to whether or not the stockholders of his own company did not tell him about the activities, alleged activities of the defendant. I think the question was to that effect.

Mr. Carr: How could they know, any more than Mr. Burnham knew, of the secret activities of these people?

(Testimony of George B. Burnham.)

The Court: The objection is overruled.

Q. (By Mr. Harrison): Mr. Burnham?

A. Well, some of the stockholders stated that it looked to them as though our competitors had, might have had something to do with the Post Office Fraud Order, but they had no knowledge of it.

Q. Didn't you believe them sufficiently to include these [117] charges in the amended complaint, that your competitors had brought about the stop order, and didn't you describe it as the borax trust? You believed, in other words, these stockholders sufficiently to include all of those charges under oath in the complaint, did you not?

A. It seemed to me if these two companies were doing all the things that they appeared to be doing, that they must be violating some law and they ought to be prosecuted, but I had no information on the matter.

Q. You felt you had enough information so you could swear that you believed those charges, did you not?

A. No, it was all on suspicion, that perhaps they were behind the fraud order, but I had no knowledge whatever.

Q. Don't you recall, Mr. Burnham, that you swore that those allegations were true to the best of your knowledge and belief, that you believed them to be true?

A. Well, I believed that they should be prosecuted if they were really causing our trouble, but I

(Testimony of George B. Burnham.)

did not know at the time what the law was on the subject. I had no clear understanding on it.

Q. Did you or did you not believe the statements of fact contained in that amended complaint to be true at the time you signed it?

Mr. Carr: We renew our objection, if your Honor please. That is incompetent, irrevelant, and immaterial. The question [118] has no bearing. It is not cross-examination. It has nothing to do with this situation. There is nothing to show what his belief was or indicate his belief between May 17, 1929 and the other date, October 10, 1939. There is nothing to show his belief or his knowledge at that time.

The Court: Overruled.

Mr. Harrison: Will you read the question, Mr. Reporter?

(Question read.)

A. Statements of fact, of course, I believed to be true, but I had no knowledge that our competitors were really actually conspiring against us.

Q. (By Mr. Harrison): You read that complaint before you signed it, did you not?

A. Yes.

Q. You had it printed, did you not?

A. Yes

Q. How many copies did you have printed?

A. I sent copies to all the stockholders.

Q. How many copies would that make?

A. 7000.

(Testimony of George B. Burnham.)

Q. You had 7000 copies and all the copies included the charges I read to the jury, did they not?

A. Yes.

Q. Who prepared that complaint?

A. Our attorney. [119]

Q. When you signed it you thought Mr. Townsend had cause to put that charge in the amended complaint, did you not?

A. I had a great deal of confidence in Mr. Townsend and Mr. Heney.

Q. I am asking you the question whether at the time you signed the complaint you believed that Mr. Townsend had cause to put those charges in the complaint; did you or did you not believe?

Mr. Carr: We renew our objection, if your Honor please, on the grounds previously stated.

The Court: The objection is overruled.

A. Yes, I believed he had good grounds to put it in the complaint.

Mr. Harrison: May we have an adjournment now, if your Honor please?

The Court: We will take a recess until tomorrow morning at ten o'clock, ladies and gentlemen. I will ask you in the meantime to bear in mind that you must not talk about the case among yourselves or with anybody else, nor are you to form or express any opinion until the case is finally submitted to you for determination. We will recess until tomorrow morning at ten o'clock.

(An adjournment was thereupon taken until tomorrow, Friday, March 28, 1947, at 10:00 o'clock a.m.) [120]

Friday, March 28, 1947

10:00 o'Clock A.M.

The Clerk: Burnham Chemical Company vs. Borax Consolidated.

Mr. Carr: Ready.

Mr. Harrison: Ready your Honor.

Mr. Carr: May it please your Honor, may we temporarily withdraw Mr. Burnham and call another witness?

The Court: Very well.

Mr. Carr: Mr. Gauge, will you take the stand, please?

WILLIAM ARTHUR GAUGE

called as a witness on behalf of the plaintiff; sworn.

The Clerk: Q. Will you state your name to the court and jury?

A. William Arthur Gauge.

Direct Examination

By Mr. Carr:

Q. What is your business, Mr. Gauge?

A. I was administrator for the Estate of W. R. Devin, and for the past years in connection with that duty I have also been a buying agent for clients abroad.

Q. Have you any connection with the firm of Gauge & Devin?

A. Yes, sir, that is the name of our concern in which I am a partner.

Q. How long have you been in that business, Mr. Gauge? [121]

A. About fourteen years.

(Testimony of William Arthur Gauge.)

Q. Do you know Mr. Jenifer, of the Pacific Coast Borax Company? A. I do.

Q. How long have you known him?

A. About fourteen years.

Q. What is his connection with that company?

A. At that time he was either the manager or he was in charge of the Pacific Coast Borax Company, of Los Angeles.

Mr. Harrison: At what time is the witness referring?

Mr. Carr: Yes, at what time? Fix the time, will you, Mr. Gauge? A. The time?

Q. Yes.

A. I would say about thirteen or fourteen years. It is pretty hard to remember back.

Q. Steadily, continuously preceding this date?

A. Continuously up to about 1938, '40, some place along in there.

Q. You mean prior to that date. Do you know whether he is an officer of that company today?

A. Yes, sir, he is an officer of that company today.

Q. What is that office?

A. As far as I know, he is the manager of the Pacific Coast Borax Company. I do not know his exact title.

Q. Do you know Mr. Gerstley, connected with that concern? [122] A. I do.

Q. What is his full name?

A. As far as I know, it is James H. Gerstley, but I have not seen him for a number of years. I don't know.

(Testimony of William Arthur Gauge.)

Q. How long have you known him?

A. About a year less than my acquaintance with Mr. F. M. Jenifer.

Q. Where were those gentlemen located? I mean in what city, during the time you have stated?

A. In Los Angeles.

Q. Did you ever do any business with the Pacific Coast Borax Company?

A. I did, when I was administrator for the Estate of W. R. Devin.

Q. What was that business?

Mr. Harrison: That is objected to as immaterial, unless some connection is shown to the issue before the jury, if the Court please.

Mr. Carr: That is a preliminary question.

The Court: You mean you just want him to state the general nature of the business?

Mr. Carr: Yes, your Honor.

The Court: Preliminary to developing some other fact?

Mr. Carr: Yes, your Honor.

The Court: I will allow it.

A. We, the Estate of W. R. Devin, had a contract with the [123] Pacific Coast Borax Company.

Q. (By Mr. Carr): What was the contract in reference to?

A. It was in reference to the supplying of borax for shipment to the Orient.

Q. Borax? A. Borax and borate ores.

Q. When was that contract entered into?

(Testimony of William Arthur Gauge.)

Mr. Harrison: That is objected to as immaterial, if the Court please.

The Court: Can't you shorten this? You want to develop that the witness had some business transactions with the Borax Company—during what period of time is this?

The Witness: About 1938—1932 to about 1938, sir.

The Court: Go ahead with your next question.

Q. (By Mr. Carr): Did you buy borax from the Pacific Coast Borax Company? A. I did.

Q. And resell? You resold it in the Orient, is that correct? A. That is correct.

Q. Who controlled the price of the sale?

Mr. Harrison: I object to that as immaterial, if the Court please. I do not know what the purpose of counsel is, or the materiality.

Mr. Carr: I submit it, your Honor. It just fits them into the conspiracy in question, alleged in our complaint. [124]

The Court: I do not understand what you mean by the question of who controled the price. You are asking the witness to give an opinion about some matter?

Mr. Carr: I withdraw the question.

The Court: I just do not understand what you are getting at.

Mr. Carr: I withdraw that question.

Q. This contract that you had with these people, the Pacific Coast Borax Company, was there any provision in it as to the resale price?

(Testimony of William Arthur Gauge.)

Mr. Harrison: That is objected to as immaterial, if the Court please. I do not see that that has anything to do with the sole issue presented to the jury, that is to say, whether——

The Court: What is the purpose of this, Counsel?

Mr. Carr: The purpose is to show the conspiracy, and we have certain letters here from one conspirator to possibly another. These are statements made by one of the conspirators in the course of the conspiracy, and it all goes to show the secretness and the hiding which is alleged in our complaint, and which is denied by the defendant.

The Court: That goes to the matter of whether or not there was a conspiracy.

Mr. Harrison: Exactly.

Mr. Carr: No, your Honor, because the conspiracy has been admitted. [125]

Mr. Harrison: We do not concede that.

Mr. Carr: The conspiracy has been admitted. It is alleged in the complaint and it is not denied by the defendants in this hearing.

The Court: We have gone into that. I am not going to permit this case to get into the area of the merits of the case, and if I did so, it would be error, and any verdict that the jury might render on the basis of any such evidence would be wholly without foundation, and even if I did not upset it the higher court would; so there is no use getting into that phase of the case.

(Testimony of William Arthur Gauge.)

Mr. Carr: Your Honor, we only do so so far as it is necessary. We have alleged that one of the elements of the tolling of the statute is to show the secreting of these particular acts, and the fact that all of the terms of this conspiracy, or part of the conspiracy, was to secrete it. We believe in this, that they, being co-conspirators, we have a right to introduce any statement from any of these conspirators which would tend in any way to prove the secrecy and the cover-up which we allege in our complaint, and which is specifically denied by these defendants for purposes of this hearing.

Mr. Harrison: If the Court please, I think counsel has in mind something that was already passed upon by your Honor, which your Honor held was not admissible in this hearing.

Mr. Carr: No, excuse me. The matter has never come up [126] except——

The Court: Counsel made rather a full statement of what he has in mind, and on the strength of that I have no hesitancy in ruling that it is wholly incompetent, irrelevant, and immaterial in this proceeding, and I am going to direct the jury to disregard it and disregard the statement of counsel. I have already told the jury and counsel that the merits of this matter are wholly extraneous. The plaintiff may have a good cause of action or he may have a bad cause of action, and we are not concerned with that. I am not going to permit the jury to try that issue, because that is not before them, and any attempt to get it before them only

(Testimony of William Arthur Gauge.)

causes the introduction of extraneous issues and would cause the verdict of the jury to be based upon matters that should not be considered by the jury, and it would be abortive of the processes of justice, and I am just not going to allow it. I will sustain the objection.

Mr. Carr: May I make one comment, if your Honor please? One of the essentials of our proceeding in this particular hearing is to prove that the defendants did cover up the situation, and we so allege in our complaint, and they have specifically denied it. Now, if we can introduce evidence to show that there was a cover-up——

The Court: That may have to do with the conspiracy, but the issue in this case is whether or not, as you have alleged [127] it, there is any unlawful concealment as to the cause of action of this plaintiff, and that entails transactions between the plaintiff and the defendants and not between third parties and the defendants.

Mr. Carr: Oh, excuse me, your Honor, may I read you some authorities of the Supreme Court of the United States? I would ask then that the jury be excused.

The Court: We have considered this matter before, Mr. Carr.

Mr. Carr: Not this part.

The Court: I will sustain the objection.

Mr. Carr: May I make a tender and offer of the evidence?

(Testimony of William Arthur Gauge.)

Mr. Harrison: I suggest that it be done in the absence of the jury.

Mr. Carr: I ask that the jury be excused so I might make my tender.

The Court: I will have the jury take its recess a little earlier today. Ladies and gentlemen, you may be excused for a brief period. Please bear in mind the admonition of the court.

(The jury retired from the courtroom and the following proceedings were had in the absence of the jury:)

Mr. Carr: Shall I proceed?

The Court: You may state what you wish to prove by this witness. [128]

Mr. Carr: May I state preliminarily what we wish, of course, to prove is the intent and the plan of the defendants to prevent anybody or any third party, any party to this proceeding or any third party, from knowing or learning of this conspiracy, which is, of course, the basis of our present action. We believe that any evidence which we can offer and which will show that it was the plan of these defendants to conceal, and it was their scheme and their general plan, we are entitled so to do, and that any statement——

The Court: Mr. Carr, there is no use of your arguing that. I have had many of these cases, and I am familiar with the law on that. Of course, all conspiracies are secret. They are all in the dark. That is why they are called conspiracies. You are

(Testimony of William Arthur Gauge.)

not entitled to present on this issue of the statute of the limitations the fact that the defendants had a secret conspiracy, because that is what you charge them with in the complaint. That is what conspiracies are. That is entirely irrelevant to the issue upon which you have demanded a jury trial, as to the question of whether or not the statute of limitations applies. I am not unfamiliar with the law that you are speaking of, but we are not trying the case now.

Mr. Carr: No, your Honor, but we are trying the statute of limitations, and one of the elements of the tolling of the statute is the secretiveness of the defendants. [129]

The Court: I do not agree that there is any such law. If you can cite me any case that would authorize this issue to be determined on the basis of general evidence that the conspiracy was a secret one, unless in some manner that is brought home to the plaintiff, then I will change my ruling.

Mr. Carr: How could it be brought home to the plaintiff?

The Court: Mr. Carr, I think it is folly to argue this matter. I understand what your point is, and I am aware of what you are endeavoring to do. I am not going to permit evidence to go to the jury in this case that pertains to the merits of the case, and on that basis have them bring in a verdict that has nothing to do with the special issue which is presented to them. It is folly to do that, because in my opinion that would not be proper administration of the judicial process in this case. I am fully

(Testimony of William Arthur Gauge.)

aware of what you are endeavoring to do, and I am not going to permit that evidence to go to the jury.

Mr. Carr: May we then offer, if it please your Honor, a letter signed by J. M. Gerstley to Mr. W. Gauge, 340 Bush Street, this city, dated June 27, 1934?

Q. Mr. Gauge, did you receive this letter?

The Court: This is only an offer of proof.

Mr. Carr: Only an offer of proof.

The Court: I think you had better make it, yourself. It is not necessary for you to have the witness testify. You [130] just state what you want to prove by this witness.

Mr. Carr: We will prove by this letter that this letter was written by the Pacific Coast Borax Company, by J. M. Gerstley, and in it states:

“Herewith confirmation of our telegram of today’s date, giving you London’s reply to the request made by Iwai & Company, Agents of your San Francisco friends, for permission to make sales up to the end of this year, which situation we discussed with you over the telephone on Monday, June 25th, after you had telegraphed us on the same date. As you had already discussed the matter with our mutual friends in San Francisco, we thought we would ask you to telephone them regarding London’s cabled reply, as we do not like to put such matters in writing for obvious reasons, and we trust you did not mind our imposing on your good nature and kind cooperation to this extent.”

(Testimony of William Arthur Gauge.)

The rest of the letter has no reference particularly to what I had in mind.

We also offer, if it please your Honor, a letter from the Pacific Coast Borax Company, dated Los Angeles, October 4, 1934, from Pacific Coast Borax Company, by J. M. Gerstley, Assistant to the Vice President, and reading in part as follows. This letter is headed, "Special Delivery."

"I have a great number of matters to discuss with [131] you and expect probably to be in San Francisco sometime around the middle of next week for a day or so, although I do not actually know when, as yet. I would appreciate your advice as to whether you expect to be in San Francisco at that time, so that as soon as I know when I may be coming I can telegraph you and arrange appointment with you."

With your Honor's permission I will come down to the part which I have in mind. (After perusing the letter.) I withdraw that particular offer.

Then the next one is a letter on the letterhead of the Pacific Coast Borax Company, addressed to Mr. W. Gauge, 340 Bush Street, and signed by Pacific Coast Borax Company, by J. M. Gerstley, and marked "Private," and also "No file copy," and it states:

"In accordance with our conversation in San Francisco recently, I am enclosing herewith translation of a short article which appeared in

(Testimony of William Arthur Gauge.)

the Osaka Yakuhim Shimbun, issued February 24th. This is the article that we feel must have been definitely prompted by some utterances given the press or otherwise by somebody connected with Toa Shoji in Japan. Your comments would be appreciated."

This is the paragraph I have reference to:

"I suggest that it would be as well to destroy this letter after perusal, merely passing on to Japan the articles in question with your own carefully worded comments." [132]

That is the one we had reference to. That is May 10, 1935, and that is the one that is marked "No file copy." "Private."

Then this was the final one. I wish to offer a letter which is in the longhand of Mr. Gerstley. It does not bear any date, but we are in a position to prove that it was written about July 8th or 9th, somewhere in that neighborhood, 1937, and this letter reads:

"Re the attached—neither Stauffer's nor Trona's agents had the desired clause in contract. That is why we were blocked our arrangements——"

Q. Maybe you had better read this.

Mr. Harrison: There should not be any testimony, Mr. Carr, unless we have an opportunity to object.

(Testimony of William Arthur Gauge.)

Mr. Carr: I am offering to introduce this letter in evidence, and the salient part of it I can read. I think I can make that out. It says:

“I am returning these letters to you as I do not want them on our files. I think, and so does P.M.J., that our letters to each other should not refer to agreements, gentlemen’s or otherwise, other than Western Contractor, unless in notes like this. I suggest you ‘lose’ your file copy of the attached letter. I have just received your longhand letter of July 7th. I’ve no idea about Takeda or Konishi. All I know is what we get from [133] London. We here have no direct dealings with B.M., so I will have to wait and see what London says. You can rest assured that anyone——” it looks like “representing our company is trying to get duties reduced in Japan is talking through his hat. Obviously we’re interested in no duties in Japan. If you can’t see that, I will be glad to explain when I see you, but I think you can see the point. My official letter today was written with one eye on the records and the other one on your people in Japan. So don’t think anything I said amiss. I couldn’t leave your letter on the file without a reply.

Best regards,” and the initials. Accompanying that offer is also the original letter which Mr. Gerstley refers to in this letter, and which Mr. Gauge wrote to them. We desire to offer those.

(Testimony of William Arthur Gauge.)

The Court: The letters may be marked as part of your offer in evidence.

Mr. Carr: I have photostatic copies of these. Inasmuch as we will desire these in other matters, may I substitute photostatic copies?

The Court: Very well.

Mr. Harrison: To which we object on the ground that they are incompetent, irrelevant, and immaterial, having nothing to do with the issue before the jury, and prejudicial.

The Court: Counsel has made his offer of evidence, so he [134] has protected his record. The Court holds it is incompetent, irrelevant, and immaterial. It has to do with the question of the merits of the case. You may mark these as exhibits in connection with the offer of evidence, by way of knowing what counsel has offered in evidence.

Mr. Harrison: But they are not in evidence.

The Court: They are not in evidence in the case. You may mark them Plaintiff's Exhibit 2 as part of plaintiff's offer of evidence.

Mr. Harrison: They are only marked for identification in connection with that offer?

The Court: That is right. They are marked for identification only in connection with the offer in evidence. I think that makes the record clear.

(The documents in question thereupon marked Plaintiff's Exhibit 2 For Identification in connection with the Plaintiff's offer of proof.)

(Testimony of William Arthur Gauge.)

Mr. Carr: May I offer each one?

The Court: You have read them. I think you can include them in one identifying exhibit number.

Mr. Harrison: Have you copies of those?

Mr. Carr: No, I have not, except my one copy, which I should like to keep.

The Court: Mr. Carr, the jury is not present, so we may save ourselves further time and effort in this case. The fact [135] that I have ruled against your various offers has nothing to do with my view as to the merits of this case. Your client may have a good cause of action against the defendants in the case. I am not unfamiliar with the case. I have had the equity case, as you know, and any man is entitled to his day in court, but we have a specific, precise question here that is being submitted to the jury, and it is just as important that stale claims be not presented as a matter of law as it is that a man who has a meritorious cause of action be allowed his day in court, and the only question before us—we have discussed this matter many times before—is whether or not there is the factual basis for bringing this cause of action at this late date. That is the only question that is being presented. You have requested a jury trial in this case, which is your right, as to this special issue, and you have it; but we cannot convert this trial into a trial of the merits of the case, and the fact that you tried to get in evidence to show that the defendants were guilty of secret and unlawful acts might be helpful to you via the route of innuendo, to get a verdict of the jury, I can't permit it,

(Testimony of William Arthur Gauge.)

because that is not the issue that is to go before the jury. We must confine ourselves to the specific question, and that is the reason for my rulings. I want to make that quite clear to you so we may know where to go from now on.

Mr. Carr: I would like, with your Honor's permission, to [136] correct a statement that you said, that we are trying to get these things before the jury by innuendo. I assure you that is not the fact.

The Court: Mr. Carr, I am familiar enough with the case to know that there is all kinds of evidence besides these few documents on the question of conspiracy, and whether or not the defendants were guilty or not guilty of that conspiracy. The court impounded, if I remember rightly, a large amount of evidence on the subject, and you might just as well bring in all that evidence to show the secret nature of the conspiracy and what the nature of the conspiracy was. That would not be material to the present issue.

Mr. Carr: I would like to disagree with your Honor that we are trying to raise anything by innuendo. Our thought, and as we read it from the authorities, is——

The Court: Mr. Carr, I am not criticising you as an attorney. You are going to do everything you can to aid the cause of your client. I am simply ruling it is immaterial.

Mr. Carr: I know, but your Honor said if I could show you that the question of secrecy was involved in this question of the statute, you would

(Testimony of William Arthur Gauge.)

change your ruling. Now, that was established in the Kimball case, and in the Pashley case, the Bear Film case, and in the Hobart case, and they all held that where the fraud, and that in this case would be the conspiracy to violate the law, is concealed——

The Court: Mr. Carr, if that was the case, then any conspiracy that was a secret conspiracy could be made the basis of a cause of action by anyone aggrieved at any time, whenever he discovered it, even if it was fifty years afterwards, and there is no such law as that.

Mr. Carr: Excuse me, your Honor. It is the question of concealment, as I read the law. Until a person is aware of his rights, the statute cannot run against him.

The Court: I have submitted this special issue to the jury as to whether or not the plaintiff knew or had cause to believe that he had a cause of action for damages by reason of acts of the defendant. Now, any act of unlawful concealment that was with respect to the plaintiff's cause of action might be material in the case, but not the acts of conspiracy within themselves that of necessity are secret, and that pertain to the conspiracy, itself. I have read all the case you have referred to and I must disagree with you as to the statement you just made. I am going to take a five-minute recess and then we will bring the jury in.

Mr. Carr: May the witness be excused? He has been under subpoena.

The Court: Yes.

(Recess.)